Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1975

Nos. 75-436, 75-437

JAMES L. BUCKLEY, *et al.*,
Appellants,
v.
FRANCIS R. VALEO, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the District of Columbia Circuit and the United States District Court for the District of Columbia

BRIEF FOR APPELLEES CENTER FOR PUBLIC FINANCING OF ELECTIONS, COMMON CAUSE, LEAGUE OF WOMEN VOTERS OF THE UNITED STATES, *et al.*

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In the Supreme Court of the United States

OCTOBER TERM, 1975

Nos. 75-436, 75-437

JAMES L. BUCKLEY, *et al.*,
Appellants,

v.

FRANCIS R. VALEO, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the District of Columbia Circuit and the United States District Court for the District of Columbia

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BRIEF FOR APPELLEES CENTER FOR PUBLIC FINANCING OF ELECTIONS, COMMON CAUSE, LEAGUE OF WOMEN VOTERS OF THE UNITED STATES, *et al.*

QUESTIONS PRESENTED

1. Have appellants proven a sufficient likelihood of unconstitutional harm to themselves or others to warrant invalidating major congressional legislation before it has had a chance to function?

2. Does the First Amendment forbid Congress to impose *any* limits on campaign contributions and expenditures, even where necessary to serve compelling interests in protecting the integrity of the electoral process?

3. Have appellants proven that the particular limits chosen by Congress will so inevitably have unconstitutional effects that the limits should be voided before they have any chance to operate?

4. Have appellants proven that the disclosure provisions of these laws are overbroad in requiring disclosure of small contributions and contributions to third party candidates?

5. Does the Constitution forbid Congress to provide *any* financial assistance for the campaigns of persons seeking election to federal office?

6. Have appellants proven that the particular public financing provisions of these statutes discriminate invidiously against them?

7. Are the provisions of these statutes concerning the powers and method of appointment of the Federal Election Commission ripe for review, and if so do they violate the constitutional separation of powers? [1]

STATEMENT OF THE CASE

This action arises out of a complaint filed in the United States District Court for the District of Columbia on January 2, 1975, seeking a declaration that appellants' constitutional rights are violated by two federal statutes:

[1] We do not address this question but respectfully submit that the decision of the court of appeals with respect to it should be affirmed, for the reasons stated in the Brief of Special Counsel to the Commission and also for the broader reasons stated in the Brief for *Amici Curiae* Senators Scott and Kennedy.

—the Federal Election Campaign Act of 1971, Public Law 92-225, 86 Stat. 3, 2 U.S.C. §§ 431 *et seq.* ("FECA"), as amended by the Federal Election Campaign Act Amendments of 1974, Public Law 93-443, 88 Stat. 1263 ("FECA Amendments"); and

—Subtitle H of the Internal Revenue Code of 1954, Public Law 92-178, 85 Stat. 562, 26 U.S.C. §§ 9001 *et seq.* ("Subtitle H"), as amended by Public Law 93-53, 87 Stat. 138, and by the FECA Amendments.

The complaint also asked that the enforcement of these statutes be enjoined.

Appellants are an assortment of federal officeholders, candidates for federal office, political organizations supporting those candidates, one chapter of a national civil liberties organization, one publication, and one donor to candidates for federal office. Appellants make three basic challenges to the new laws: First, they deny that Congress has authority to impose *any* limits on campaign contributions or expenditures or to provide *any* public financing to campaigns for election to federal office. Second, they attack the specific contribution, expenditure, public financing, and disclosure provisions Congress enacted on the ground that they will necessarily operate discriminatorily and have other impermissible effects. Third, they attack the composition and powers of the Federal Election Commission (FEC) as a violation of the separation of powers.

The defendants named in the complaint are the Secretary of the United States Senate, the Clerk of the United States House of Representatives, the Comptroller General of the United States, the Attorney General of the United States, and the FEC.

Appellees Center for Public Financing of Elections, Common Cause, League of Women Voters of the United States, *et al.* intervened as defendants with the permission of the court of appeals. They are three nonprofit organizations that have as their aim the protection of the integrity of the electoral process, and eight individual voters active in these organizations.

Pursuant to Section 315(a) of the FECA as amended, 2 U.S.C. § 437h, the district court (Corcoran, J.) on January 27, 1975 certified the proceeding to the court of appeals. On April 14, that court *en banc* granted the defendants' and intervening defendants' motion to remand, and ordered the district court to identify constitutional issues in the complaint, take evidence, make findings of fact, and certify constitutional questions to the court of appeals. The April 14 Order also directed that the public financing issues raised by Subtitle H be argued both to the court of appeals and to a three-judge district court, so as to eliminate any doubt as to the correct method of reviewing Subtitle H.

On May 19, 1975 the district court completed its assigned tasks and transmitted its findings of fact and its certified constitutional questions to the court of appeals. The district court's findings—which are based largely on stipulations by the parties and which appellants do not challenge—detail a history of campaign financing abuses proving, as the court of appeals found, that

> "the Government has a clear and compelling interest in safeguarding the integrity of elections and avoiding the undue influence of wealth." Ct. App. Op. 1517.[2]

[2] The court of appeals' decision is reproduced in Appendix A to the jurisdictional statement in No. 75-436. Page citations herein are to the page numbers of the slip opinion, which are identical to the page numbers in that appendix.

As the court of appeals concluded, the findings contain only "scant" and "skimpy" evidence to support appellants' allegations of harm from the challenged statutes. *Id.* at 1546.[3] The district court's findings are discussed in more detail in the Argument below.

The court of appeals heard oral arguments *en banc* on June 13, 1975, sitting together with the three-judge district court, and both courts announced their decisions on August 15, 1975. They upheld all major provisions of the statutes. With respect to certain provisions dealing with the powers of the FEC, they held that appellants' challenge was premature. The court of appeals invalidated one peripheral disclosure provision as overbroad.[4] The court of appeals explained its decision in an 88-page *per curiam* opinion, joined on most issues by six of the eight judges. The three-judge district court did not issue a separate opinion but relied on the *per curiam* opinion of the court of appeals.

Appellants appealed to this Court from the decisions of both lower courts. All appellees supported the request to note probable jurisdiction, and the Court noted probable jurisdiction on October 6, 1975.

[3] Under the unique review provisions of Section 315(a), 2 U.S.C. § 437h(a), the court of appeals was the initial finder of "ultimate" facts based on the district court's subsidiary findings.

[4] The provision held unconstitutional, 2 U.S.C. § 437a, required financial disclosures by "issue" groups not directly involved in federal election campaigns. The court of appeals held that Section 437a "is not a core section and is plainly severable from the balance of the legislation." Ct. App. Op. 1519. No appeal has been taken from the invalidation of that provision, and it is not discussed herein.

SUMMARY OF ARGUMENT

Prematurity and Failure of Proof. Section 315 of the FECA did not and could not empower an Article III court to render an advisory opinion. Despite the broad sweep of appellants' claims, few of the effects of the challenged provisions are ready for judicial review. The provisions have not yet had a chance to function in a single regular election year. The FEC is only beginning to interpret and apply them to concrete situations, and none of its interpretations or regulations is now before the Court for review.

Appellants' hypothetical assertions of injury and discrimination have not actually occurred in fact, either to appellants or to anyone else, and there is no proof that they ever will. As the courts below found, appellants' own deposition testimony and the record of past elections either belies their predictions or is at worst equivocal. As plaintiffs attacking the constitutionality of a new statute, appellants have failed to carry their burden of proving that the mere existence of the statute has produced or threatens immediately to produce the injuries they claim.

This Court's treatment of the constitutionality of the Hatch Act (5 U.S.C. § 7324) suggests the appropriate judicial response. In *United Public Workers* v. *Mitchell*, 330 U.S. 75 (1947), the Court had before it a similarly broad challenge to that statute's ban on political activities, filed soon after its enactment. The Court rejected the broad challenge on the ground that the statute served compelling public interests and posed only a "hypothetical threat" to the constitutional rights asserted by plaintiffs. The Court resolved only the narrow issue one plaintiff properly posed, saying "[i]t would not accord with judicial responsibility to adjudge" the broader issues until "definite rights appear upon the one side and definite prejudicial interferences upon the other." *Id.* at 90 (footnote omitted).

Twenty-five years later, another challenge to the Hatch Act came before the Court. *Civil Service Commission* v. *Letter Carriers*, 413 U.S. 548 (1973). The Court reviewed the Commission's administration of the Act since 1940 and the detailed interpretive regulations it had issued and upheld the constitutionality of the statute and the regulations "as actually applied in practice." *Id.* at 575.

Similar principles of judicial responsibility apply here. To the extent appellants argue that the challenged provisions are unconstitutional on their face because Congress may not set *any* limits on campaign contributions and expenditures and may not provide *any* public financing for presidential campaigns, their claims can and should be adjudicated **now**. But their claims should be rejected to the extent **their** arguments **turn** on actions the FEC may or may not take at some future date, or on their unprovable predictions and speculations as to how the particular statutory limits and public financing provisions may or may not work in a variety of presently hypothetical circumstances.

The Basic Congressional Power. Congress has the express constitutional duty to make laws regulating the "Times, Places and Manner" of electing members of the Senate and House (Article I, § 4), and the same implied power for presidential elections. *Burroughs* **v.** *United States*, 290 U.S. 534 (1934). "To say that Congress is without power to pass appropriate legislation to safeguard such an election from the improper use of

money to influence the result is to deny to the nation in a vital particular the power of self-protection." *Id.* at 545. Since the central purpose of the challenged provisions is precisely to "safeguard" federal elections "from the improper use of money," they are clearly within the lawmaking power unless they infringe on other constitutional rights.

The Relationship of Money to Speech. Appellants argue that any monetary limits on campaign giving and spending have impermissible effects on political speech. The challenged provisions place no limit whatever on the content or quantity of political speech. The harms they seek to remedy are not the effects of unlimited *speech* on the integrity of the political process, but the effects of unlimited *money*. These laws do not touch, nor are their objectives frustrated by, any actions that increase the reach of political speech without further escalating the cost of campaigns.[5]

Of course, it is true that the more money a candidate has available, the more he might try to disseminate his message. If unlimited money were available, some candidates would spend it all, just as the Pentagon would "fortify the moon." It is only in this sense that the regulation of campaign money has any effects on political expression and other constitutional values protected by the First Amendment. We submit that when such effects are entirely incidental to the purpose of the statute—

[5] For example, the Federal Communications Commission's recent reinterpretation of the "equal time" rule will have the effect of expanding the reach of candidate speech at no cost to candidates or their supporters. But it will not frustrate the objectives of these laws, because the harms at which they aim do not arise out of the fact that candidates speak or that their speech reaches many voters. *See* pp. 89-91, *infra*.

as is true here—they can be justified by compelling needs of at least equal constitutional importance, so long as the result does not go beyond what Congress has reasonably determined to be the least restrictive means of meeting those needs. *United States* v. *O'Brien*, 391 U.S. 367 (1968). We also agree that the congressional judgments as to the existence of the needs and the selection of the remedies demand close judicial scrutiny. We submit that these very strict standards are met by the statutory provisions now ripe for review.

The Compelling Needs. Compelling public needs—all of them closely related to First Amendment as well as other constitutional values—sustain the validity of the statutes challenged here. The primary compelling need is to curb the undue influence of a wealthy few on candidate positions and on government actions—and the corrosive effect of both the fact of such influence and its appearance on the public's confidence in the integrity of its elected government.

The compelling need to check public cynicism and restore public confidence in the integrity of government has been rising in urgency for more than a decade. By 1974, it could not have been plainer. Unlimited campaign giving and spending had created a powerful magnetic attraction between candidates and wealthy individuals and groups. It had also created a pervasive and in some cases accurate public belief that candidates who seek and obtain the disproportionate support of the wealthy grant government favors and relieve government pressures in gratitude or exchange. As the courts below found, the record is full of such instances: the sordid tale of the milk contributions and the consequent shift in governmental policy on milk price supports; the outright sale of ambassadorships; the dunning of businessmen and

labor leaders by or on behalf of the members of congressional committees with oversight over the particular interests of those solicited; the contributors who frankly admitted they gave to those with governmental power over their special interests in order to advance or defend those interests; and the numerous contributors who gave to opposing candidates running for the same office.

As this Court noted in *Civil Service Commission* v. *Letter Carriers*, 413 U.S. 548, 565 (1973), "it is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative government is not to be eroded to a disastrous extent." What applies to the apparent behavior of civil servants applies with equal force to the apparent behavior of our most important elected officials and of candidates for these high elective offices.

An ancillary compelling need is the same constitutional interest that underpins the apportionment and voting rights cases—to equalize as far as practicable the relative ability of all voters to affect electoral choices. Nothing much can be done about some differences among voters, such as their degree of political interest, their skill in advocacy, or their willingness to engage in campaign work. But something can be done about the ability of the wealthy few to make large contributions and the extreme, almost drug-like dependence of candidates on obtaining these large contributions in order to match the expenditures of their opponents. It was this same compelling need that persuaded this Court to strike down the large state filing fees held unconstitutional in *Bullock* v. *Carter*, 405 U.S. 134, 144 (1972), because they

created "disparity in voting power based on wealth" between the "wealthy few" and the "unwealthy many." *See* Ct. App. Op. 1517.

The courts below found that in the 1974 congressional elections, 90 per cent of all campaign contributions came from less than 1 per cent of the voters. In the 1972 elections, the 1254 largest contributors—less than 0.001 percent of the voting age population—accounted for over $51 million in campaign contributions. A mere 153 individuals—less than one two-thousandth of one percent of those who voted for Mr. Nixon—contributed some $20 million or about a third of the money raised in his campaign.

As the courts below found, the record shows that candidates must spend a disproportionate amount of their time and effort to solicit gifts from these large donors, and must pay a disproportionate amount of attention to their views. There is plainly a compelling constitutional need to prevent the wealthy few from having a stronger political voice per vote than the unwealthy many—not because of the persuasiveness of their ideas or how many other voters agree with them, but solely because they give and spend more money than most citizens can afford.

Yet another compelling constitutional interest is served: to more nearly equalize the opportunity of all interested citizens to become candidates for elective federal office, and to reduce the barrier that lack of personal wealth or access to the wealth of others now presents.

As the courts below correctly found, the skyrocketing political "arms race" has far outstripped the pace of inflation. In presidential campaigns, expenditures

rose from $27 million in 1960 to $38 million in 1964 to $56 million in 1968 to $94 million in 1972—an increase of 210 percent in 12 years, five times the 41.3% increase in the consumer price index. In congressional races expenditures rose at comparable rates. (Pp. 67-68, *infra*). A political analogue of Gresham's Law has been at work: the more each candidate has raised and spent, the more his opponent has raised and spent, until the entire process has been cheapened and sheer cost has become a major barrier to political entry. *Bullock* v. *Carter*, *supra*, stands squarely for the constitutional importance of lowering this barrier.

Some reasonable limits on individual and organizational contributions are plainly essential if we are to moderate the undue influence of large contributors on candidates, reduce the pernicious appearance of such influence, and expand participation in the political process. Any restrictive impact of equal evenhanded giving and spending limits on freedom of expression is very indirect. Nothing in these limits touches the content of speech. Giving and spending money are not speech. Action, however, intertwined with speech, is not entitled to the full and special protection of speech itself. *Cox* v. *Louisiana*, 379 U.S. 559 (1965); *United States* v. *O'Brien*, 391 U.S. 367 (1968); *Kovacs* v. *Cooper*, 336 U.S. 77 (1949). As Professor Freund has said:

> "The right to speak is, I submit, more central to the values envisaged by the First Amendment than the right to spend. We are dealing here not so much with the right of personal expression or even association, but with dollars and decibels. And just as the volume of sound may be limited by law, so the volume of dollars may be limited, without violating the First Amendment."

Contribution Limits. The most significant and representative contribution limit in the new statutes is the $1,000 limit on individual gifts to a single candidate. Appellants have presented no convincing proof that this limit is unreasonable on its face. The relatively few persons who make contributions larger than $1,000 have had disproportionate influence over the conduct of political campaigns and the actions of public officials after their election. Contributions of the scale previously permitted create the appearance and widespread public belief of such misconduct. Stewart Mott, the sole appellant who has contributed and intends to contribute more than $1,000 per candidate, himself attempted to exercise such influence by dangling the prospect of $1 million in contributions if a presidential candidate would endorse views compatible with Mott's own.

Moreover, contrary to appellants' allegations, neither challengers nor minor parties depend more on contributions over $1,000 than the incumbents or major parties they oppose. As the courts below found, the record shows that if the excess over $1,000 of all individual contributions were eliminated from the totals raised in the 1972 and 1974 elections, challengers and minor party and independent candidates would have been financially better off or at least no worse off relative to incumbents and major party candidates than they were without the limitation. The $1,000 limitation has not been shown to discriminate against any class of which an appellant is a member, invidiously or otherwise.

Expenditure Ceilings. The expenditure ceilings in the challenged statutes serve compelling constitutional needs. As the courts below found, they reinforce the contribu-

tion limits and help to prevent their wholesale evasion. They also put an effective stop to the skyrocketing political money race, and lower the barrier to entry of additional candidates that the increasing cost of campaigning now raises. They do not touch the content of candidate speech or prevent any candidate from speaking as much as he wants. True, candidates will be equally limited in the number of dollars they can spend to amplify their voices, just as contributors are limited in the dollars they may give. But in Professor Freund's phrase, the spending ceilings deal merely with "dollars and decibels," not with the content or quantity of speech itself.

Appellants have not shown that these equal spending ceilings will deny ample opportunity for candidates to speak freely and to conduct fully effective campaigns. As the courts below found, in only a small fraction of the 1972 and 1974 congressional races did one or both candidates exceed the spending limits that will apply to future races under the new laws. In the 1975 special Senate election in New Hampshire, conducted under the new laws, both candidates lived within the spending limits and managed to turn out a vote much higher than they turned out in the 1974 election when the new spending limits did not apply. The new presidential limits were exceeded in 1972, but the very excesses of this campaign are what most shocked the nation and spurred Congress to provide a remedy. And Mr. Nixon's own Finance Chairman has testified that in his judgment an amount within the new limits would have been sufficient to conduct the 1972 campaign. P. 70, *infra*. Moreover, as shown below, the presidential spending limits are important to the public financing portion of the Act.

Ironically, one basis of appellants' attack is that the ceilings are totally evenhanded. Appellants argue that this equality is unconstitutional because challengers need to spend more than incumbents, and minor party and independent candidates need to spend more than major party candidates. But, as the courts below found, nothing in the record begins to prove that in practice equal ceilings will disfavor any appellant or any class such as challengers for office or third party candidates. To the contrary, in view of the fact that incumbents and major party candidates generally have outspent challengers and minor party and independent candidates, spending ceilings will tend to reduce the spending advantages of the former classes. Appellants have shown no unreasonable restriction or invidious discrimination in the expenditure ceilings to outweigh the important First Amendment and other constitutional values they serve.

As the courts below found, the $1,000 limit on "independent" expenditures by an individual to promote the election or defeat of a candidate stands on the same constitutional footing as a limitation on contributions. Indeed, it is essential to close an otherwise yawning gap in the limitations on contributions, since a donor could otherwise spend as much as he wished for the creation and broadcasting of candidate "commercials" instead of giving the same amount for the same purpose to the candidate's campaign committee. This Court should uphold the provision on its face and decline to rule on any hypothetical applications of it that are not now presented in a concrete case or controversy, for the reasons stated herein and in the Brief for *Amici Curiae* Senators Scott and Kennedy.

Disclosure Requirements. Disclosure presents few constitutional problems. In the oft-quoted phrase of Mr.

Justice Brandeis, sunlight is still "the best of disinfectants." Citizens have a clear First Amendment right to know who contributes substantial amounts to each candidate's campaign and how much each candidate raises and spends. And the availability of this information helps the press to be an effective watchdog of government.

Nothing but speculation supports appellants' suggestion that disclosure will "chill" contributions. Although disclosure requirements for contributions over $100 have been on the statute books since 1910, appellants have produced no significant example of an actual "chilling" effect. Courts have repeatedly rejected such attacks on campaign disclosure laws. *E.g.*, *United States* v. *Finance Committee to Re-Elect the President*, 507 F.2d 1194 (D.C. Cir. 1974). The reporting requirements were adopted for an express and proper public purpose, not for some ulterior and improper deterrent purpose, as in *NAACP* v. *Alabama*, 357 U.S. 449 (1958). They are fundamental protections reasonably related to the public's First Amendment right to know and the need to enforce the remainder of this reform legislation.

As the courts below found, the record provides no basis for the Court to second-guess the judgment of Congress in setting the disclosure floor at contributions of more than $100, particularly since the record does demonstrate that disclosure of relatively small contributions assists in detecting cumulative contributions from closely associated persons.

Similarly, the record provides no basis for concluding that minor party and independent candidates should be exempt from the requirements of disclosure. Citizens have no less need for such information merely because a party's or candidate's adherents are not numerous. Minor

party and independent candidates often have an appreciable impact on elections. Moreover, any such exemption would create an enormous loophole and a strong incentive toward party fractionalization and instability.

Least Restrictive Means. Appellants suggest that laws against bribery and laws requiring the disclosure of large contributions to the major parties are sufficient, and that the provisions of the challenged statutes limiting contributions and expenditures and requiring broader disclosure amount to unconstitutional legislative overkill. But anti-bribery and disclosure laws have been on the books for most of the last fifty years without solving the evils they address. They were in effect throughout the 1972 campaign, but they did little to lessen the dependence of candidates and officeholders on large contributors, to prevent large contributors from wielding or appearing to wield undue influence over government actions, or to slow the accelerating upward spiral of candidate expenditures and the barrier it creates to entry by new candidates.

This Court has upheld laws more restrictive of political expression than those challenged here, where necessary to meet similarly compelling needs. The Hatch Act's direct prohibitions of campaign activity by civil servants, including many activities well within the umbrella of the First Amendment, have been upheld because of the compelling need to serve the constitutional value of impartiality in public administration. *Civil Service Commission* v. *Letter Carriers*, 413 U.S. 548 (1973). And despite many opportunities to rule on the point, this Court has never struck down the statutes directly prohibiting campaign contributions and expenditures by corporations and labor unions—prohibitions that certainly affect First Amendment rights. Many opinions

of this Court recognize the compelling need to prevent the aggregated interests of such large special interest groups from improperly influencing the outcome of federal elections. *See* Mr. Justice Frankfurter's opinion in *United States* v. *UAW*, 352 U.S. 567 (1957), and the dissenting opinion of Mr. Justice Douglas at 598 n. 2.

The elected members of Congress are certainly as expert as any branch of government in determining the measures necessary to regulate the financing of elections so as to prevent corruption, to remove "disparities in voting power based on wealth" (*Bullock* v. *Carter*, 405 U.S. 134, 144 (1972)), and to maintain public confidence in the integrity of the electoral process and of elected officials. Congress has tried varying combinations of laws over the past 50 years and has learned from experience what does and does not work. With the grim record of the 1972 and earlier election scandals before it, Congress devised the comprehensive and complementary set of measures now challenged. As we show and as the court of appeals properly concluded, neither the facts of record nor the wisdom of judicial experience affords any basis for concluding that Congress selected means more restrictive than necessary to meet the compelling needs it faced.

Public Financing of Presidential Campaigns. The public financing provisions of the new law are a creative step toward eliminating the dependence of presidential candidates on private money to fuel their campaigns. Financial assistance to campaigns for federal office is a proper use of the congressional power to raise and spend money to provide for the general welfare. It effectuates the purposes of Articles I and II—as well as the First Amendment—by permitting candidates to reduce their debilitating dependence on large private contributions.

Appellants asserting interests in presidential campaigns have failed to prove that the public financing provisions will injure them in any way, or that they will tilt the balance of political power against any class of which appellants are a part. While the provisions draw distinctions between major, minor, and new parties, a failure to draw such distinctions would violate common sense. "Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike." *Jenness* v. *Fortson*, 403 U.S. 431, 442 (1971). Compelling interests justify awarding differential assistance to different types of parties based on their electoral support, and denying assistance to parties and non-party candidates that have not established "a significant modicum of support." *Id.* at 442. The distinctions in the statute are objective and nondiscriminatory on their face. They leave all parties free to move from one level of subsidy to another on the basis of their demonstrated popular support. The statute in no way impairs "the potential fluidity of American political life." *Id.* at 439. Virtually identical distinctions have been upheld in laws defining the rights of candidates to be named on the ballot in *Jenness, supra; Storer* v. *Brown*, 415 U.S. 724 (1974); and *American Party* v. *White*, 415 U.S. 767 (1974).

Under the challenged provisions, candidates of parties which in the previous election achieved more than the five percent "significant modicum of support" approved in *Jenness* will receive public financing during the campaign itself. Since such funding would be impracticable for new parties and parties which achieved less than a "significant modicum" in the previous election, those parties remain free to obtain and spend private contributions before the election; in addition, they are pro-

vided public financing after the election on the basis of the support they have proven. Equal protection of the laws cannot require more equality than the circumstances make possible.

Appellants' theoretical arguments about discrimination are refuted by the facts of previous elections. The challenged statutes impose a ceiling of $20 million on the amount that any presidential candidate may spend, whether or not he accepts public financing. In 1972, well before the election, both major party candidates had easily raised funds in excess of the new ceilings, even when the excess over $1,000 of large contributions is excluded from the calculation. There is no showing that absent the challenged legislation they would fail to do so in 1976. Pre-election entitlements of public funds in 1976 will therefore not increase the financial advantages of major party presidential candidates over other candidates. To the contrary, the public financing and expenditure limits of the new laws will reduce those advantages.

The new laws also provide public financing for party conventions and assistance to all candidates in party primaries through matching of small private contributions. Public financing for the costs of conducting these early stages of the electoral process has already been upheld. *American Party* v. *White*, *supra*. The matching mechanism used to allocate primary assistance is a traditional feature of federal assistance programs, and provides a valid means of assessing a candidate's popular support. The statute's reasonable eligibility requirements for assistance in the primaries, as in the general election, are plainly necessary to avoid waste of public money on the frivolous candidacies that would arise in the absence of such requirements. No feature of these primary and

convention financing provisions has been shown to discriminate invidiously against any appellant.

* * * *

The Constitution does not condemn the nation to continue suffering old abuses that reached new extremes in the 1972 campaign. As the court of appeals concluded, "these latest efforts on the part of our government to cleanse its democratic processes should at least be given a chance to prove themselves. Certainly they should not be rejected because they might have some incidental, not clearly defined, effect on First Amendment freedoms. To do so might be Aesopian in the sense of the dog losing his bone going after its deceptively larger reflection in the water." Ct. App. Op. 1582.

ARGUMENT

I. APPELLANTS HAVE SHOWN NO REASON WHY THIS COURT SHOULD INVALIDATE THE CHALLENGED LEGISLATION BEFORE IT HAS BEEN GIVEN A CHANCE TO WORK

Appellants filed this suit the day after the FECA Amendments took effect, in an effort to wipe the challenged statutes off the books before they could be tested in actual operation. Indeed, appellant Buckley, who unsuccessfully opposed the laws in Congress, introduced an expedited judicial review provision to facilitate his design to challenge the congressional decision in the courts.[6]

Appellants rushed to court with three basic attacks on the statutes. First, they argue that Congress has no power to regulate campaign contributions and expenditures or to provide public financing for campaigns—under any compelling circumstances and regardless of the specific statutory provisions. Congress may not, appellants argue, impose *any* limit on the size of contributions to federal candidates. It may not impose *any* ceiling on a candidate's spending to seek federal office. And it may not provide *any* form of public financing to reduce candidates' dependence on large private contributions. Appellants do concede that Congress may impose some requirements to disclose the identity of contributors.

Second, appellants argue that the *particular* provisions of these statutes are constitutionally infirm. They assert that the contribution and expenditure limits are too low

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to permit "effective" campaigns. They argue that the

[6] Buckley Deposition Tr. at 38-39; 120 Cong. Rec. S5702-08 (daily ed. April 10, 1974).

limits—which are facially evenhanded—are intended to favor and will in fact favor incumbents over challengers and major party candidates over independent and minor party candidates. They also argue that the public financing mechanism has discriminatory effects and that the disclosure thresholds are set so low as to restrict the right of political association.

Third, they attack the composition and powers of the FEC—an attack that is answered by the FEC itself and the *Amici Curiae* Senators Scott and Kennedy and that we do not address.

This case requires the Court to make much less new constitutional law than appellants suggest. Some purely legal issues seem ripe for decision—such as those raised by appellants' claim that their rights are threatened because any limits on contributions or expenditures and any public financing are unconstitutional. The Court should reject appellants' extreme position on those issues, as did six of the eight judges on the court of appeals. Appellants' contentions about the future consequences of the specific statutory provisions should be rejected as speculative and unproven. Precedent and sound judicial policy dictate that major congressional enactments should be tested on their actual—not hypothetical—results.

A. Appellants' "Proof" of Harm is Nothing More Than Allegations of Their Own Beliefs and Speculation About Possible Effects of the Statutes

Appellants attack virtually every provision of these statutes, alleging that each provision will cause constitutional harm to one or more appellants. But appellants bring to this Court little more than theories and beliefs to throw against congressional judgments based on a decade of legislative inquiry and over fifty years

of electoral abuses. Appellants' Br. 14-24.[7] Appellants' "proof" of harm amounts to little more than a litany of their "beliefs" and "desires" *Id.* Judging from their past experiences, their concerns are unfounded. As found by the courts below, appellants' "proof" is speculative and insubstantial, particularly in comparison to the compelling interests the challenged statutes serve. Ct. App. Op. 1540, 1546; *cf. Warth* v. *Seldin*, 95 S. Ct. 2197, 2205-07, 2210, 2214 (1975).

1. *The "Harm" Allegedly Caused by Contribution Limits*

The appellant in this action who presents the clearest case of the effect of the contribution limits is Stewart Mott. The district court found that Mr. Mott is not an average contributor.[8] Indeed, probably not more than a handful of the nation's 70-odd million voters give as much to politicians as he does, or could afford to do so. Nonetheless, most of Mott's contributions to candidates would not be affected by the contribution limits. For example, only 16 out of 110 contributions Mott made to candidates in the congressional races in 1974 were in excess of $1,000. Findings III, Mott ¶ 18, IIB J.A. 726. Moreover, Mr. Mott has pursued a wide variety of non-financial activities to express his political and social views. Mott Deposition Tr. at 41-43; Mott Affidavit, ¶ 16.

[7] Indeed, appellants opposed even the most cursory of fact-finding proceedings below, urging instead that the parties include in their briefs whatever factual material they wished, "for what it's worth." Letter from Brice M. Clagett to Hugh E. Kline, Clerk, United States Court of Appeals for the District of Columbia Circuit (March 3, 1975), in response to that court's inquiry "of the parties as to their expectations regarding the need for the taking of evidence . . . ." *See* I J.A. 74-77.

[8] Memorandum and Order of May 19, 1975 (hereinafter "Findings") III, Mott ¶ 21, IIB J.A. 726. Citations to the Joint Appendix are in the form "[volume] J.A. [page]."

There is no evidence that any of the other appellants will be affected by the $1,000 contribution limit in their capacity as contributors.[9]

Nor is there evidence that any appellant will be harmed by the limits on expenditures of personal and family funds by a candidate. Senator Buckley and his immediate family spent less than $20,000 in both his 1968 and 1970 Senatorial campaigns. Findings III, Buckley ¶ 40, IIB J.A. 707. The statutory limit is $35,000. No Conservative Party candidate has exceeded the limits in Senate or House races. Findings III, Mahoney ¶¶ 12, 13, IIB J.A. 718. Senator McCarthy cannot afford to exceed the $50,000 limit in his 1976 presidential race. Findings III, McCarthy ¶ 28, IIB J.A. 718. Congressman Steiger has not exceeded these limits in the past. Findings III, Steiger ¶ 19, IIB J.A. 732. And the Libertarian Party has not shown that any of its candidates has ever exceeded the limits. Findings III, Crane ¶ 3, IIB J.A. 750.

Appellants also challenge the $5,000 limit on contributions by political committees, yet they produce no evidence that they will be harmed by this limit. Senator McCarthy does not know how many contributions in excess of $5,000 he received in 1968; nor does he have institutional support for his 1976 race. Findings III, McCarthy ¶¶ 9, 23, 25, IIB J.A. 715, 717-18. Congressman Steiger received less than $5,000 from his party in 1966. Findings III, Steiger ¶ 20, IIB J.A. 732.

Appellants have also failed to demonstrate their reliance on contributions in excess of $1,000 in their ca-

[9] For example, Senator Buckley cannot remember contributing more than $1,000 to the campaign of a candidate for federal office, or contributing as much as $2,000 to candidates within any one calendar year. Findings III, Buckley ¶¶ 37, 39, IIB J.A. 707.

pacity as recipients of funds. The party appellants have received the great majority of their contributions in amounts of $1,000 or less.[10] Only 180 persons—out of 40,000 persons who contributed—gave $1,000 or more to Senator Buckley's 1970 campaign. Findings III, Buckley ¶¶ 18, 41, IIB J.A. 703, 707; Weil Deposition Tr. at 7.[11] Many of the other appellants were unable to state in depositions what contributions they have received in excess of $1,000.[12]

Appellant McCarthy asserts that the contribution limits will harm his current race as an independent candidate for President in 1976. Yet his extensive efforts to raise large contributions before the limits went into effect on January 1, 1975 resulted in only five or six contributions in excess of $1,000. Findings III, McCarthy ¶ 23, IIB J.A. 717-18; Monroe Deposition Tr. at 14. McCarthy does not know whether he tried to raise money in small

[10] Findings III, Mahoney ¶¶ 6, 10, IIB J.A. 709-10 (Conservative Party). Of the 4,000 contributors to the Libertarian Party between 1971 and 1975, only 10 have given over $1,000; the contributors who threaten to violate the law in the future have never given over $1,000 in the past. Findings III, Crane ¶¶ 8-9, IIB J.A. 751-52. The American Conservative Union has never received a contribution over $1,000. Findings III, Joy ¶ 13, IIB J.A. 750. The Conservative Victory Fund (CVF) received three contributions over $1,000 in 1972 and one in 1974; the total "overage" was only $14,500 out of total contributions of $220,080. The average contirbution to the CVF is $16. Findings III, Roberts ¶¶ 7, 11, 13, IIB J.A. 743-44. Moreover, the CVF does not anticipate any future gifts in excess of $1,000. Roberts Deposition Tr. at 83.

[11] Furthermore, the treasurer of Senator Buckley's 1970 campaign states that some of these "persons" are actually organizations to which the $5,000 limit will apply and almost all of those who gave $1,000 or more in fact gave *exactly* $1,000. Weil Deposition Tr. at 10, 13, 20, 21.

[12] Findings III, Mahoney ¶ 14, IIB J.A. 711 (Conservative Party); Findings III, McCarthy ¶¶ 4, 9, IIB J.A. 714-15; Findings III, Crane ¶ 6, IIB J.A. 751 (Libertarian Party); Findings III, Reed ¶ 15, IIB J.A. 741 (Mississippi Republican Party).

contributions for the 1968 New Hampshire presidential primary or how much of his $11 million receipts in 1968 was from contributions in excess of $1,000; and he admits that he received large amounts of money in small contributions after that primary. Findings III, McCarthy ¶¶ 4, 6, 9, 10, IIB J.A. 714-15; McCarthy Deposition Tr. at 30-31.

The Chairman of the Mississippi Republican Party alleges that the Party's candidates will be harmed by the contribution limits. Yet he does not know how many individuals contributed more than $1,000 to Mississippi Democratic or Republican candidates for federal office in 1972 and 1974, or how much money was raised in individual contributions larger than $1,000 by candidates of either party in those years. Findings III, Reed ¶ 15, IIB J.A. 741. In fact, in 1974 incumbent Democrats in Mississippi relied more heavily on contributions in excess of $1,000 than did their Republican challengers. Findings III, Reed ¶ 2, IIB J.A. 739; *id.* IIC, ¶¶ 2, 16, IIB J.A. 587, 698.

The National Chairman of the Libertarian Party claims his party has a special need to receive contributions in excess of $1,000. But the evidence shows that large contributions play a miniscule role in the Party's operations. The Chairman does not know how many contributions to any of the Party's federal candidates have been in excess of $1,000.[13] Approximately five individuals told the Chairman that they may make gifts exceeding the $1,000 limitation, but none of those individuals has

[13] The reports filed for those candidates under the FECA do not show any contributions in excess of $1,000. The Chairman estimates that 10 out of 4,000 contributions to the Party have been individual contributions in excess of $1,000. Findings III, Crane ¶¶ 6-8, IIB J.A. 751.

made such gifts in the past. Findings III, Crane ¶ 9, IIB J.A. 752.

Appellant Conservative Victory Fund (CVF) alleges that it supports mostly challengers to incumbents; it objects to the $5,000 limit on the amount it can contribute as a registered political committee to any single candidate for federal office. In 1972 and 1974, CVF contributed only $14,450 in excess of the $5,000 limit; only approximately 14 percent of this went to challengers. Findings III, Roberts ¶ 7, IIB J.A. 743-44; Roberts Affidavit, ¶¶ 9, 16.

The district court found that appellant American Conservative Union (ACU) has terminated its registration as a political committee and has no present intention to make contributions to candidates for federal office. Findings III, Joy ¶ 3, IIB J.A. 747-48. Between 1972 and 1975, ACU made only one direct contribution to a candidate for federal office, in the sum of $2,500. Findings III, Joy ¶ 12, IIB J.A. 749.

2. *The "Harm" Allegedly Caused by Expenditure Ceilings*

None of the individual appellants who have in the past been candidates for election to federal office, or the party appellants who have sponsored such candidates, appears to have exceeded what would have been the expenditure limits applicable to them under the challenged legislation.

Appellant Buckley spent about $1.4 million in his 1970 Senate race in New York.[14] Incumbent Republican

[14] Buckley Deposition, Ex. 1, at vi, ix, x; Weil Deposition Tr. at 5-7.

Senator Goodell spent $1.0 million, while Buckley's Democratic opponent Representative Ottinger spent $4.7 million. Buckley Deposition, Ex. 1, at vi. The applicable combined overall limit (for primary and general elections; *see* Appendix A) would have been approximately $3.0 million. Hence, the limit would have reduced the spending of one of Buckley's opponents in 1970—but not Buckley's own spending.

Appellant Conservative Party of the State of New York does not make expenditures on behalf of candidates, Findings III, Mahoney ¶ 11, IIB J.A. 71; hence, the only harm it could suffer under the challenged ceilings would be harm to the candidates it endorses. Yet the Chairman testified that in every race the Conservative Party candidate has been outspent, Mahoney Deposition Tr. at 44; they have in fact been vastly outspent.[15] Hence, the Conservative Party can only be helped by the legislation it challenges. Furthermore, the Chairman of the Party testified that Ms. Keating's Senate campaign in 1970, run on $190,000, was "successful" in his view. Findings III, Mahoney ¶ 17, IIB J.A. 712.

Appellant Steiger has never spent more than the new limits allow. He spent less than $64,000 in his 1966 House race as a challenger and in his 1968, 1970, 1972, and 1974 re-election races. Furthermore, Congressman Steiger has not shown that the spending limits will

[15] In the 1974 Senate race, the Conservative candidate Keating spent $192,462. The Republican incumbent Javits spent $1,090,473, while the Democrat Clark spent $855,576. Findings IIA, ¶ 6, IIA J.A. 392. Mahoney Deposition Tr. at 43, 62. In House races the Conservative Party fielded candidates in 19 of the 39 congressional districts of New York. All of these 19 were outspent by all major party opponents. Findings IIA, ¶ 5, IIA J.A. 361-66; the same pattern is apparent in the 1972 House races. *See* Findings IIA, ¶¶ 2, 3, IIA J.A. 298-302.

preclude his making a successful campaign for the Senate against an incumbent Senator. Indeed, he has not yet declared as a 1976 candidate for the Senate.

Appellant McCarthy admits that independent and minor party candidates have difficulty matching the spending of the major parties. Findings III, McCarthy ¶ 29, IIB J.A. 718. He had raised only $59,000 for his 1976 campaign when he testified, but was "hopeful" of raising $24 million. *Id.* ¶¶ 22-23, IIB J.A. 717-18. Under the new ceilings, he will be able to spend $36 million if he can raise it. *See* p. 153, *infra.*

Past experience indicates that the Libertarian Party's spending will not approach the statutory limits. The campaign of the Libertarian Party candidate for President in 1972 spent between $5,000 and $6,000. Findings III, Crane ¶ 10, IIB J.A. 752.

The Chairman of the Mississippi Republican Party does not know how much money Mississippi Republican and Democratic congressional candidates spent in 1972 or 1974, but the facts found by the district court show that Mississippi Republican challengers to incumbents may be helped by the expenditure limits. In the past, Mississippi's incumbent Democratic Senators have grossly outspent their Republican opponents. *See, e.g.*, Findings III, Reed ¶ 2, IIB J.A. 739; *id.* IIA, ¶ 4, IIA J.A. 323.

The Executive Director of appellant CVF testified that he does not know whether the Fund would be harmed by the expenditure limits and does not know how much challengers supported by the CVF spent in 1970, 1972, or 1974. Roberts Deposition Tr. at 34-37, 41A.

3. *The "Harm" Allegedly Caused by Disclosure*

Disclosure of contributions over $100 has been required since 1910. Yet, as the court of appeals found, the record contains "only scant evidence tending to show a 'chilling effect' resulting from disclosure, and only a skimpy indication of harassment of those whose contributions were disclosed in the 1972 and 1974 elections. . . ." Ct. App. Op. 1546 (footnote omitted).

The First Amended Complaint is virtually devoid of any allegation that any appellant will cease making political contributions because of the disclosure provisions of the challenged statutes. On the contrary, the First Amended Complaint, appellants' affidavits, and appellants' deposition testimony demonstrate that appellants have contributed and intend to contribute reportable amounts in the future despite the disclosure requirements.

Appellant Mott testified that he favors strong reporting and disclosure requirements such as those contained in the statute he challenges. Mott Deposition Tr. at 30-31. Indeed, Mott's description of his past contributions in his affidavit demonstrates that disclosure has no deterrent effect whatsoever on him.

Furthermore, the appellant candidates and parties have failed to prove that the statute will deter contributions to them. The district court was unable to find, with one inconsequential exception, any facts tending to prove that a potential contributor has been deterred from contributing by disclosure or that a contributor has been subjected to any reprisal in consequence of disclosure.[16] Ap-

[16] The single exception was based on hearsay. Two persons solicited by a Ms. Wertheimer for a contribution to a Libertarian Party gubernatorial campaign in New York purportedly refused to contribute because they were unwilling to have their names

pellant Buckley testified that he has never heard that any individual has refused to contribute to his campaigns or would refuse to contribute to any future campaigns because of disclosure. Buckley Deposition Tr. at 71-72. *See also* Findings III, Buckley ¶¶ 26, 33, IIB J.A. 705, 706.

Similarly, the district court found that the State Chairman of appellant Conservative Party had no evidence that any individual whose name had been disclosed as a contributor to his party had been subjected to harassment or reprisal as a result of such disclosure. Findings II, Mahoney ¶ 9, IIB J.A. 711.

Although appellant McCarthy testified that two individuals had been reluctant to contribute to his 1976 campaign because of disclosure (McCarthy Deposition Tr. at 17-18, 67-70), the district court—apparently unconvinced because of other evidence in the record [17]—did not find this as a fact. McCarthy further testified that he was unaware of any reprisals taken against individuals because of disclosure of their contributions to his prior political campaigns. McCarthy Deposition Tr. at 102. *See also* Findings III, Monroe ¶ 11, IIB J.A. 720.

The district court found that the Chairman of appellant Mississippi Republican Party knew of no individual making ongoing contributions to the party who had told him he would withdraw his support if his name

disclosed. Findings III, Wertheimer ¶ 6, IIB J.A. 737. The district court found that Ms. Wertheimer had no evidence of any incident of harassment or reprisal against persons whose names were reported as contributors to the Libertarian Party during that campaign. *Id.* ¶ 11, IIB J.A. 738.

[17] McCarthy Deposition Tr. at 17-18, 67-70; Monroe Deposition Tr. at 41-44.

were disclosed. Findings III, Reed ¶ 6, IIB J.A. 740. The district court further found that the Chairman had no specific evidence that anyone was harassed as a result of the FECA's reporting requirements. *Id.* ¶ 14, IIB J.A. 741.

The district court found that appellant ACU had reported the names of 137 contributors pursuant to the FECA and the FECA Amendments. Findings III, Joy ¶ 8, IIB J.A. 748-49. But the court found that ACU's Treasurer had no evidence that any contributor had been harassed as a result of the disclosure or that any person would refuse to contribute because his name would be disclosed. *Id.*

The district court found that the National Chairman of appellant Libertarian Party knew of no contributor to his party or its candidates who had incurred harm or refused to contribute as a result of disclosure of his name as a contributor. Findings III, Crane ¶¶ 12-13, IIB J.A. 752; Crane Deposition Tr. at 30.

Furthermore, neither appellant Steiger nor the Executive Director of appellant CVF testified to any knowledge about actual deterrent effects from disclosure. Steiger Deposition, *passim*; Roberts Deposition, *passim*.

4. *The "Harm" Allegedly Caused by Public Financing of Presidential Campaigns*

The district court's findings show that no appellant is in a position to be harmed by the public financing provisions. McCarthy is an independent or "new party" candidate [18] and testified he *will not accept* public fi-

[18] *See* pp. 223-25, *infra*.

nancing for his presidential campaign even if he receives enough votes to qualify for it after the election. Findings III, McCarthy ¶ 30, IIB J.A. 718. Appellant Libertarian Party will also refuse public funds if it qualifies after the 1976 presidential election. Crane Deposition Tr. at 32-33, 62-63.

Appellant Conservative Party has never nominated a candidate for President who was not also the presidential candidate of one of the two major parties (Findings III, Mahoney ¶ 15, IIB J.A. 711; Mahoney Deposition Tr. at 39-40) and thus independently entitled to the maximum amount of public financing. 26 U.S.C. § 9004(a)(1).

B. There Are No "Unique Factors" That Render These Laws Constitutionally Suspect

Appellants devote much of their brief to the contention that the court of appeals "failed to give this legislation adequate scrutiny." *E.g.*, Appellants' Br. 36. There is no dispute in this case about the standard of review. These statutes have incidental effects on vital First Amendment interests and must—like any statutes affecting similar interests—be shown to serve "compelling needs" and to be no more restrictive than necessary to serve those needs. The court of appeals expressly applied those standards. It agreed with appellants that "strict judicial scrutiny of the challenged provisions is appropriate." Ct. App. Op. 1519.

The court of appeals "closely scrutinized Plaintiffs' contentions" and concluded that these statutes serve "a clear and compelling interest in safeguarding the integrity of elections and avoiding the unnecessary influence of wealth" and that "the statute taken as a whole affirmatively enhances First Amendment values."

Id. at 1517. As we show in Part IV, these conclusions are correct.

Appellants say that Congress in enacting campaign reform laws faces "a plain conflict of interest," because such laws may "affect the political balance between challengers and incumbents." Appellants' Br. 27. They suggest repeatedly that these laws are an attempt by incumbents to guarantee their own reelection. That suggestion defames the national legislature and is unsupported by the record.

It is settled that "this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *United States* v. *O'Brien*, 391 U.S. 367, 383 (1968); *Arizona* v. *California*, 283 U.S. 423, 456 (1931) (Brandeis, J.). The Court said in *O'Brien*:

> "Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature, because the benefit to sound decision-making in this circumstance is thought sufficient to risk the possibility of misreading Congress' purpose. It is entirely a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork." 391 U.S. at 383-84 (footnote omitted).

These statutes are completely evenhanded as between incumbents and challengers and among candidates of all

points of view. The available evidence suggests they will help, not hinder, challengers in their attempt to match incumbents' spending. *See* pp. 112-29, 143-51, *infra*. Thus, even if some incumbent congressmen had hoped to benefit themselves, that hope would be no ground for invalidating the laws.

In any event, the members of Congress did not conceive and enact these laws to promote their own financial advantages in future campaigns. Since incumbents have always had a great advantage in fund-raising, inertia and self-advantage might well have resulted in no laws being enacted. That Congress acted so decisively is less suggestive of self-interest than of appropriate legislative response to a felt public demand.[19] If any concern for reelection motivated the members of Congress in enacting these laws, it was the legitimate concern of elected representatives that a vote against campaign financing reform would anger their constituents.[20]

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[19] Appellants' insinuation that incumbents passed these laws to protect themselves is countered by appellants' own argument, made elsewhere, that the laws result from the overreaction of politicians to intense public sentiment arising out of Watergate. Appellants' Br. 37-38.

[20] Public sentiment increasingly favors these laws. *See* Findings I, ¶ 133, IIA J.A. 180-89. Appellants argue that "the latest Harris poll" is not a guide to interpreting the First Amendment. Appellants' Br. 38-39. We agree. However, the growing majority of the American public that supports these laws refutes appellants' claim that Congress enacted them in its own interest rather than that of the public. It also refutes appellants' irrelevant assertion that "[t]he tide" has turned against this legislation. *Id.* at 74.

Major newspapers across the country continue to voice strong editorial support for these laws. *E.g.*, "Hope for the Election Reform Act," The Louisville Times, Aug. 19, 1975; "A Chance to Prove Itself," Philadelphia Bulletin, Aug. 20, 1975; "Good News on the Campaign Front," Baltimore Sun, Aug. 19, 1975; "Election Reform Upheld," Albuquerque Journal, Aug. 17, 1975; "A Right to Spend?," Des Moines Register, Sept. 7, 1975; "Free Speech, Big Money,"

Moreover, reality contradicts appellants' notion that Congress is a monolithic group of incumbents, all of whom share the identical interest in the reelection of all. Congress consists of 535 individuals, each with his own constituency, ideology, party—and political problems. The self-interest of an individual Congressman depends on such highly variable factors as his personal wealth, his access to wealthy contributors, and his perception of how his next political rival will fare on those counts. There is no reason for this Court to assume that these facially evenhanded statutes are an ingenious attempt by congressional incumbents to pull the ladder up after themselves, and that incumbent appellants Buckley and Steiger stand alone in virtuous self-denial.

Under our Constitution, Congress is the source of *all* legislation. To suggest that campaign reform laws are inherently suspect because they will affect the members who vote on them is to argue that the Constitution permits no legislative remedy for abuses of the electoral process. That nihilistic proposition answers itself.

C. Settled Judicial Policy Dictates That These Statutes Should Be Given a Chance to Operate as Congress Intended

After years of intensive study, Congress concluded that the evils plaguing the electoral process present a compelling need for an effective remedy. Congress studied

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The New York Times, Aug. 16, 1975; "The Election Reform Act in Court," Sacramento Bee, Aug. 31, 1975; "A Boost for Campaign Reform," Christian Science Monitor, Aug. 21, 1975; "Costly Campaigns and Free Speech," The Washington Post, Aug. 21, 1975; "Money and Politics," Newark Star Ledger, Aug. 19, 1975.

Congress is preparing to take a further step by extending public financing to congressional campaigns. *See* note 113, *infra*.

and tried many alternatives and decided that the reforms achieved by the challenged statutes will work without producing the harmful effects that appellants predict. Congress is in a far better position than are either the appellants or this Court to make these essentially practical, factual assessments of the probable effects the laws will have. At least until the actual effects can be seen, the Court should defer to those legislative judgments.

> "[I]t is clear to us that proper regard for the special function of Congress in making determinations of legislative fact compels this Court to respect those determinations unless they are contradicted by evidence far stronger than anything that has been adduced . . . ." *Oregon* v. *Mitchell*, 400 U.S. 112, 240 (1970) (Brennan, White & Marshall, JJ.).[21]

The Court followed such a course in upholding the Voting Rights Act of 1965 in *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966). In that case, a sweeping and innovative Act of Congress was challenged on the ground that it abridged constitutional rights as fundamental as the First Amendment rights asserted here. The Court sustained the law, placing much reliance on congressional findings and judgments very similar to those that prompted Congress to pass these statutes. The Court said:

> "The constitutional propriety of the Voting Rights Act of 1965 must be judged with reference to the historical experience which it reflects." *Id.* at 308.

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[21] *See also California Bankers Ass'n* v. *Shultz*, 416 U.S. 21, 75-76 (1974); *Golden* v. *Zwickler*, 394 U.S. 103, 110 (1969); *United States* v. *Finance Comm. to Re-Elect the President*, 507 F.2d 1194, 1200 (D.C. Cir. 1974); *Gomez* v. *Wilson*, 477 F.2d 411, 416 (D.C. Cir. 1973); Cox, *The Role of Congress in Constitutional Determinations*, 40 U. Cin. L. Rev. 199, 209 (1971).

The Court accepted the congressional judgment about the need for the law, emphasizing two points: that "Congress felt itself confronted by an insidious and pervasive evil," and that "Congress concluded that the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures." *Id.* at 309-19. The situation is identical here.

Many of appellants' arguments attack congressional judgments about where the lines should be drawn to achieve effective reform. Congress is peculiarly well suited to make those judgments, especially where, as here, the permissibility of the lines drawn turns less on abstract constitutional principles than on the *practical impact of the laws in operation*. Courts traditionally eschew second-guessing Congress in such situations, even where the lines drawn by Congress are alleged to violate First Amendment or other fundamental rights.[22]

The Court should not invalidate these statutes by finding constitutional injury that depends on the "concurrence of . . . contingent events . . . too speculative to warrant anticipatory judicial determinations." *Eccles* v. *Peoples Bank*, 333 U.S. 426, 432 (1948); *Longshoremen's Union* v. *Boyd*, 347 U.S. 222, 224 (1954). This case fits perfectly Mr. Justice Frankfurter's warning that:

> "Counsel are prone to shape litigation, so far as it is within their control, in order to secure comprehensive rulings. . . . Such desire on their part is not diffi-

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[22] *See, e.g., Oregon* v. *Mitchell*, 400 U.S. 112, 142-44 (Douglas, J.), 206-07 (Harlan, J.), 240-49, 278-81 (Brennan, J., joined by White and Marshall, JJ.) 282 (Stewart, J., joined by Burger, C.J., and Blackmun, J.) (1970); *Pell* v. *Procunier*, 417 U.S. 817, 827-28 (1974); *United States* v. *Finance Comm. to Re-Elect the President*, 507 F.2d 1194, 1200-02 (D.C. Cir. 1974); *Cox, supra* note 21, at 223.

cult to appreciate. But the Court has its responsibility. Matter now buried under abstract constitutional issues may, by the elucidation of a trial, be brought to the surface, and in the outcome constitutional questions may disappear. Allegations of the indictment hypothetically framed to elicit a ruling from this Court or based upon misunderstanding of the facts may not survive the test of proof." *United States* v. *UAW*, 352 U.S. 567, 592 (1957).

See Rescue Army v. *Municipal Court*, 331 U.S. 549 (1947); *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring).[23]

The Court has applied this principle in First Amendment litigation strikingly similar to the case at bar. When a challenge to the Hatch Act first came here, it was based on allegations of hypothetical First Amendment injury comparable to those of the present case. The Court refused to declare the Act unconstitutional:

> "The power of courts, and ultimately of this Court, to pass upon the constitutionality of acts of Congress arises only when the interests of litigants require the use of this judicial authority for their protection against actual interference. A hypothetical threat is not enough. We can only speculate as to the kinds of political activity the appellants desire to engage in or as to the contents of their proposed public statements or the circumstances of their publication. It would not accord with judicial responsibility to adjudge, in a matter involving constitutionality, between the free-

[23] "Indeed, one principal justification for giving the independent review of legislation to the judiciary lies in the ability of a court to weigh constitutional claims on the basis of experience which was not available when the legislature acted."

Karst, *Legislative Facts in Constitutional Litigation*, 1960 Sup. Ct. Rev. 75, 76.

> dom of the individual and the requirements of public order except when definite rights appear upon the one side and definite prejudicial interferences upon the other." *United Public Workers* v. *Mitchell*, 330 U.S. 75, 89-90 (1947) (footnote omitted).[24]

The subsequent history of Hatch Act litigation proves the wisdom of the Court's rejection of the First Amendment attack in *Mitchell*. When the issue returned here in *Civil Service Commission* v. *Letter Carriers*, 413 U.S. 548 (1973), the Court was presented with the actual or threatened enforcement of the Act against specific conduct, against the backdrop of years of experience with its operation. *See id.* at 551-53, 574-81. The Court said:

> "The Commission was to *issue notice, hold hearings, adjudicate, and enforce.* This process, inevitably and predictably, would *entail further development of the law* . . . and would be productive of a *more refined definition* of what conduct would or would not violate the statutory prohibition of taking an active part in political management and political campaigns.
>
> ". . . It is to these regulations purporting to construe § 7324 *as actually applied in practice*, as well as to the statute itself, with its various exclusions, that we address ourselves in rejecting the claim that the Act is unconstitutionally vague and overbroad." *Id.* at 575 (emphasis added and citations omitted).

In this context, the Court upheld the law. We submit that the same principle of judicial responsibility applies

[24] A concrete claim was presented by one plaintiff, Poole, whom the Civil Service Commission had charged with a specific violation of its regulations. The Court upheld the constitutionality of the statute as applied to that specific conduct. 330 U.S. at 91-93.

here. *Compare Block* v. *Hirsh*, 256 U.S. 135, 153 (1921), *with Chastleton Corp.* v. *Sinclair*, 264 U.S. 543 (1924).

II. CONGRESS HAS POWER TO REGULATE FEDERAL CAMPAIGN FINANCING

As the court of appeals held, "[t]he constitutional power of Congress to regulate federal elections (including the pre-election stages) is extensive." Ct. App. Op. 1516-17. This power arises from the express provision of Article I authorizing Congress to regulate the "Manner" of conducting congressional elections [25] and from the implied authorization in Article II to regulate presidential elections. If Congress were powerless to assure the fairness and integrity of the elections by which national officers are chosen, the very legitimacy of the Government would be jeopardized.[26]

In a series of decisions beginning in 1879, the Court has held that the authority of Congress under Article I encompasses any measures Congress reasonably believes will help to ensure that elections are fairly conducted and provide the electorate an effective means to choose its representatives.[27] The Court has held that Article II confers an equally broad implied power to

[25] "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the places of chusing Senators." U.S. Const., art. I, § 4.

[26] *Cf. Reynolds* v. *Sims*, 377 U.S. 533, 554-55, 562-68 (1964).

[27] *See, e.g., Ex parte Siebold*, 100 U.S. 371 (1879) (provision of election marshals to supervise congressional elections); *Ex parte Yarbrough*, 110 U.S. 651 (1884) (protection of voters against intimidation, force, or hindrance in exercise of right to vote); *United States* v. *Mosley*, 238 U.S. 383 (1915) (protection of accuracy of vote counting and reporting).

protect presidential elections. In *Burroughs* v. *United States*, 290 U.S. 534 (1934), the Court upheld the record-keeping and reporting requirements of the Federal Corrupt Practices Act of 1925,[28] which were similar in many respects to those of the challenged statutes, as applied to presidential elections. The Court said:

> "To say that Congress is without power to pass appropriate legislation to safeguard . . . [a presidential] election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self-protection. Congress, undoubtedly, possesses that power, as it possesses every other power essential to preserve the departments and institutions of the general government from impairment or destruction, whether threatened by force or by corruption.
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> . . . . .
>
> "If it has not this power it is left helpless before the two great natural and historical enemies of all republics, open violence and insidious corruption." 290 U.S. at 545, 546.

In succeeding years, the Court has sustained the constitutionality of several congressional enactments regulating federal elections.[29] It has never held any of these laws to be beyond the scope of Congress' power.[30] The

[28] 2 U.S.C. §§ 241-56 (1970) (repealed). That Act was repealed and replaced by the challenged statutes.

[29] *See, e.g., South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966); *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966); *Oregon* v. *Mitchell*, 400 U.S. 112 (1970) (opinion of Mr. Justice Black); *cf. United States* v. *Harriss*, 347 U.S. 612 (1954).

[30] In 1921 the Court ruled that the power to regulate congressional elections did not extend to primaries. *Newberry* v. *United States*, 256 U.S. 232 (1921). That ruling was overturned in *United States* v. *Classic*, 313 U.S. 299 (1941), and it is now clear that all

existence and breadth of that power are now beyond dispute.[31]

Congress has great latitude in choosing means to protect the electoral process. As the Court said in *Burroughs*:

> "The power of Congress to protect the election of President and Vice-President from corruption being clear, the choice of means to that end presents a question primarily addressed to the judgment of Congress." 290 U.S. at 547.

Congress may, as it repeatedly has, directly regulate individual conduct in order to prevent practices injurious to the electoral process. Or it may use its taxing and spending powers to promote that same end—just as it may to achieve any other permissible goal.[32] The legislation challenged in this case takes both those routes.

III. CONGRESS FOUND A COMPELLING NEED TO REMEDY SERIOUS ABUSES OF THE ELECTORAL PROCESS

Popular election of Congress and the President anchors the American system of government. But age-old abuses

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stages of the electoral process—including primaries and conventions—are within the reach of Congress' power. *See, e.g., Smith* v. *Allwright*, 321 U.S. 649 (1944); *Terry* v. *Adams*, 345 U.S. 461 (1953); *cf. Developments in the Law—Elections*, 88 Harv. L. Rev. 1111, 1182-84 (1975).

[31] T. Emerson, The System of Freedom of Expression 635-40 (1970); A. Rosenthal, Federal Regulation of Campaign Finance: Some Constitutional Questions 12-19 (1971); Bickel, *Commentary*, in *id.* at 64; Cox, *Commentary*, in *id.* at 68; Freund, *Commentary*, in *id.* at 71.

[32] *See* U.S. Const. art. I., § 8, cl. 1; *United States* v. *Butler*, 297 U.S. 1 (1936); *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937); *Helvering* v. *Davis*, 301 U.S. 619 (1937).

and newer manifestations of the role of money have impeached the integrity of the electoral process. For more than half a century, Congress has enacted various measures to deter these evils,[33] but they persist. The 1972 election and its aftermath shocked the nation, and the public demanded that Congress take further corrective measures. Congress responded by enacting these laws to end the debilitating, almost drug-like dependence of candidates on large campaign contributions.

Congress acted after considering a formidable body of evidence about the consequences of unfettered private financing of federal election campaigns. A familiarity with that evidence is critical to judicial review of the remedies Congress enacted. As Mr. Justice Frankfurter instructed with respect to an earlier campaign reform statute:

> "Appreciation of the circumstances that begot this statute is necessary for its understanding, and understanding of it is necessary for adjudication of the legal problems before us. Speaking broadly, what is involved here is the integrity of our electoral process, and, not less, the responsibility of the individual citizen for the successful functioning of that process. This case thus raises issues not less than basic to a democratic society." *United States* v. *UAW*, 352 U.S. 567, 570 (1957).

The legislative record shows that campaign financing abuses have threatened the very legitimacy of federal elections and that reform was imperative.

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[33] Federal Corrupt Practices Act of 1910, 36 Stat. 822-24, as amended, 37 Stat. 25-29 (1911); Federal Corrupt Practices Act of 1925, 43 Stat. 1070, 2 U.S.C. §§ 241-256 (repealed); Hatch Act of 1940, 54 Stat. 767; Federal Election Campaign Act of 1971, 86 Stat. 11, 2 U.S.C. §§ 431-454. *See* Ct. App. Op. 1589-93.

A. Congress Found that Dependence on Large Campaign Contributions Has Exposed Candidates and Elected Officials to Improper Influence

Congress rightly concluded on the basis of voluminous evidence that the dependence of candidates on large contributions is one of the cardinal flaws in past campaign financing practices. Congress found and the district court confirmed that the need to finance expensive campaigns forces candidates and their solicitors to seek large contributions from wealthy individuals and groups. Because governmental decisions often vitally affect the interests of those individuals and groups, large contributions are often made to further private interests by facilitating access to government officials or influencing governmental decisions. In return, elected officials have tended to afford special access and treatment to large contributors.[34] Appellants' image of the disinterested contributor motivated by general rather than personal interests may sometimes be true but generally does not mirror reality.[35]

The relationship between candidates and potential large contributors is symbiotic: The candidates depend on monied and special interests to make the large gifts they believe necessary to finance their costly campaigns; monied and special interests depend on the decisions made by elected officials to advance their private goals. The "dangers and pressures of conflict" and abuse on both sides of this relationship are obvious.[36] The appearance

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[34] D. Dunn, Financing Presidential Campaigns 19-20 (1972).

[35] *See* S. Rep. No. 689, 93d Cong., 2d Sess. 4 (1974); Findings I, ¶¶ 108, 110, 118, 170, IIA J.A. 147-48, 153, 266.

[36] *See Hearings on S. 1103, S. 1954, and S. 2417 Before the Subcomm. on Privileges and Elections of the Senate Comm. on Rules and Administration*, 93d Cong., 1st Sess. 72 (1973); S. Rep. No. 689, *supra* note 35, at 4. *See also* Peabody, *et al.*, To Enact a Law: Congress and Campaign Financing (1972); Lobel, *Federal Control of Campaign Contributions*, 51 Minn. L. Rev. 1, 25 (1966); Note, *Campaign Finance Reform: Pollution Control for the Smoke-Filled Rooms?*, 23 Case W. Res. L. Rev. 631, 637 (1972); Note, *The Constitutionality of Financial Disclosure Laws*, 59 Cornell L. Rev. 345, 346 n. 11 (1974); Comment, *The Constitutionality of Restrictions on Individual Contributions to Candidates in Federal Elections*, 122 U. Pa. L. Rev. 1609 (1974).

of impropriety is inescapable—an appearance that is as corrosive as the reality.[37] And the ugly fact of impropriety and illegality was demonstrated in 1972 beyond the point of surfeit.

The record before Congress was replete with specific examples of improper attempts to obtain governmental favor in return for large campaign contributions. *See* Findings I, ¶¶ 159-64, IIA J.A. 254-55. For example, the Senate Select Committee on Presidential Campaign Activities learned that dairy organizations attempted to gain access to government officials of both parties and to influence governmental decisions affecting them by making large legal and illegal campaign contributions. Findings I, ¶ 158, IIA J.A. 254. One dairy executive testified that his organization decided to contribute $100,000 in illegal corporate funds to Herbert Kalmbach, a Nixon fund-raiser, in 1969—after the election—because

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[37] Senator James Abourezk testified that:

> "It is really the appearance of corruption that harms us, I think, more than any corruption that does go on, because there are certain controversial amendments up today that I would like to vote for, but because I received contributions from dairy farmers around the country, I am almost afraid to vote for them because it is set up now in the press that anybody who does vote for them who has taken money from the dairy farmers has been bought off."

Hearings on S. 372 Before the Subcomm. on Privileges and Elections of the Senate Comm. on Rules and Administration, 93d Cong., 1st Sess. 207 (1973).

"it appeared we were not going to get anyplace if we did not." [38] Kalmbach explained his understanding of the arrangement to the Senate as follows:

> "[I]n return for that [$100,000] contribution it would be possible for me [Kalmbach] to arrange for several appointments with various people within the White House in order for . . . the attorneys for the milk producers to meet with the White House officials to present a case on their behalf." *Final Report*, *supra* note 38, at 593 (footnote omitted).

Kalmbach further testified that a dairy attorney had advised him that the $100,000 contribution had been made in connection with the dairy group's "objective" of achieving "90 percent price supports for dairy farmers." *Id.* at 592.

The dairy industry pledged to contribute $2,000,000 to the 1972 Republican presidential campaign, a pledge of which the President and other White House officials were aware. *Id.* at 612-14, 616. On March 23, 1971, after a meeting with dairy organization representatives, the President decided to increase milk price supports, thereby reversing a decision of his Secretary of Agriculture. During the next two days, before this decision was announced, White House officials and Kalmbach held a series of meetings with dairy organization officials. In describing these meetings to the Senate, Kalmbach admitted the relationship between the decision and the pledge of large contributions as follows:

> "[M]y understanding was simply . . . that the price support would be announced the next day; and that in view of that fact, . . . the pledge [by the dairy organizations of $2,000,000] to the President's 1972 campaign was being reaffirmed . . . ." *Id.* at 664; *see id.* at 645-48.

[38] *Final Report of the Senate Select Comm. on Presidential Campaign Activities*, S. Rep. No. 981, 93d Cong., 2d Sess. 581 (1974) (hereinafter cited as "*Final Report*").

The efforts of the dairy organizations were not restricted to a single party. Those organizations also made large legal and illegal contributions to Representative Wilbur Mills' Democratic presidential campaign; Mills as Chairman of the House Ways and Means Committee was a key figure on congressional action concerning milk price supports. *Id.* at 905, 908-20. (*See* Findings I, ¶ 103, IIA J.A. 101-07, for a list of contributions by these dairy organizations during 1972.) [39]

That both the solicitors and the donors of such contributions expect them to influence governmental decisions is vividly illustrated by the following letter written by a dairy official who attended the March 23 meeting with the President:

> "The facts of life are that the economic welfare of dairymen does depend a great deal on political action. If dairymen are to receive their fair share of the governmental financial pie that we all pay for, we must have friends in Government. I have become increasingly aware that the sincere and soft voice of the dairy farmer is no match for the jingle of hard currencies put in the campaign funds of the politicians by the vegetable fat interests, labor, oil, steel, airlines, and others. . . .

[39] Appellants argue that these laws contain loopholes that would permit the dairy interests' huge contributions to continue. Appellants' Br. 69-72. They are mistaken. *See* pp. 130-32, *infra*. Appellants also assert that the vast majority of special interest contributions have been small. Appellants' Br. 66. That unsupported assertion is refuted by the record of contributions by dairy groups, labor groups, and others.

"On March 23, 1971, . . . I sat in the Cabinet Room of the White House across the table from the President . . . and heard him compliment the dairymen. . . . He said, 'You people are my friends and I appreciate it.' Two days later an order came from the U.S. Department of Agriculture increasing the support price for milk to 85 percent of parity, which added from $500 to $700 million to dairy farmers [sic] milk checks. We dairymen cannot afford to overlook this kind of economic benefits. Whether we like it or not, this is the way the system works." *Final Report*, *supra* note 38, at 671 (footnote omitted).

Similar improprieties occurred in connection with ambassadorial appointments. Over $1.7 million in contributions to the winning 1972 presidential campaign can be attributed in whole or in part to persons who received ambassadorial appointments from the incumbent Administration. *Id.* at 493; Findings I, ¶ 124, IIA J.A. 155. To recite only a few: the former Ambassador to Great Britain contributed $254,000; the former Ambassador to Switzerland, $100,000; the Ambassador to Luxembourg, $300,000; the Ambassador to Belgium, $115,100; the Ambassador to The Netherlands, $100,900; the former Ambassador to Austria, $100,500; the former Ambassador to France, $303,000; the former Ambassador to Jamaica, $103,500; and the former Ambassador to Trinidad and Tobago, $100,500. *Id.* It is well known that Presidents of both parties have long named large contributors to ambassadorships.

In confirmation of what this pattern suggests, Herbert Kalmbach pleaded guilty to promising a European ambassadorship to one J. Fife Symington, Jr., in return for a $100,000 contribution, and testified that he had reached a similar arrangement with another ambassadorial candidate.[40] As Kalmbach described it to the Senate, the Symington affair involved the clearest possible *quid pro quo*:

"He [Symington] said . . . I will contribute $100,000 to the President . . . [b]ut I want to make it plain that . . . before I make this pledge firm . . . I would like to be certain . . . that I will receive an appointment to a European post. . . . I [Kalmbach] . . . called Bob Haldeman. . . .

"The operator . . . put me through to Larry Higby [Haldeman's aide]. . . .

"[H]e [Higby] said the answer is go. You can go ahead on that." *Final Report*, *supra* note 38, at 497-98.

Congress learned of other, similar efforts to obtain government favor by offering large campaign contributions. Congress heard testimony that in 1972, one person offered a $100,000 contribution only because he thought it would cause the lifting of a HUD suspension on his construction business. The witness testified:

"A. . . . I asked: Do I have any reassurance here that I am going to get anything for my money? I mean I did not make the contribution for any other reason than—

"Q. You were not seeking to make a contribution to the election of the President?

"A. No, sir, I really was not interested in making that contribution."[41]

Appellant Mott himself was party to a particularly stark effort to persuade a candidate for President to

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[40] *Final Report*, *supra* note 38, at 497-98, 501-02; Findings I, ¶¶ 121-22, IIB J.A. 154.

[41] *Hearings Before the Senate Select Comm. on Presidential Campaign Activities*, 93d Cong., 1st Sess. 5336 (1973).

change his position on an important public issue by dangling in front of him the prospect of large campaign contributions. After Vice President Humphrey was nominated for President at the 1968 Democratic convention, Mott wrote to him as follows:

> "To my knowledge, none of us ["key McCarthy supporters"] has declared his support for you and your candidacy. Again, as far as I know, none of us has contributed towards your campaign. Although we each have the capability to contribute something more towards political campaigns in 1968, most of us are reserving our donations to give towards the campaigns of 'peace' candidates . . . .
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> ". . . I came to the conclusion that the least we . . . could do for you would be to give you a hearing —a personal private interview of an hour's length —in order to question you about your own view of the nation's future and what it ought to be.
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> • • • •
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> ". . . We realize that you would like to have us become contributors towards your campaign, but you should not expect an immediate decision from any of us, checkbook-in-hand. If we become 'turned on' and enthusiastic towards your candidacy, we have the capacity to give $1,000,000 or more to your campaign—and raise twice or three times that amount. But we will each make our own individual judgments on the basis of how you answer our several questions and how you conduct your campaign in the coming weeks." [42]

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[42] Mott Deposition, Ex. 5, *confirmed, id.* Tr. at 13-14, 34. In 1971, when Senator Jackson was seeking the Democratic presidential nomination for 1972, M. T. Mehdi of The Action Committee on American-Arab Relations wrote to Jackson:

> "The Arab Americans and American Arabists, viewing you as a serious man . . . have decided to offer you the opportunity to wage your campaign for nomination as a freer man and with a greater possibility to succeed.
>
> "More specifically, we are offering you our financial support. Presently, there are pledges ranging from $800,000 to $1 million. . . . Furthermore, I am happy to advise you that we are ready to offer you at least twice as much financial support as the Jewish funds you are seeking and you can realistically expect."

Mehdi later said about the offer: "While it is true that this is not done in public, in reality this is done, so why should we be so hypocritical?" Making the offer, he said, was "as American as apple pie. . . . We are looking for one great, strong politician to stand on his feet and say, 'To hell with Israel.' " 4 National Journal 68 (1972).

That large contributions buy access to candidates and elected officials—and thus the opportunity to attempt to influence them—has been the common experience of elective politics. As Senator Charles Mathias testified without dispute in this action:

> "Candidates usually know and remember the names of individuals who make large contributions. An official may not change his or her vote solely to accommodate the views of such contributors, but often officials, including myself, will agree to meet with an individual who made a large contribution so the official can hear the contributor's concerns and make the contributor aware these concerns have been considered. . . . Since an elected official has only so much time available, the inevitable result of such special treatment for the large contributor is that other citizens are denied the opportunity they otherwise would have to confer with the elected official." [43]

The burden of the evidence is inescapable. What other inference adequately accounts for the common practice of

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[43] Affidavit of Charles McC. Mathias, Jr., Ex. I to Proposed Findings of Fact of Intervenor-Defendants Common Cause and John Gardner, ¶ 11(b); Findings I, ¶¶ 170-71, IIA J.A. 256-57. Appellant McCarthy, after reading this statement, generally agreed. McCarthy Deposition Tr. at 98-99.

many large donors of contributing to both candidates for the same office? In the 1972 and 1974 federal elections, registered interest groups made contributions on more than 450 occasions to two or more candidates for the same office, for a total of more than $1.3 million.[44]

For example, the political arm of the Teamsters Union in Alaska contributed to two Democratic candidates and one Republican candidate in the 1974 Alaska Senate race. Findings IIA, ¶ 109, IIB J.A. 470. During the 1972 election, Gulf Oil illegally contributed corporate funds to three presidential candidates—President Nixon, Senator Jackson, and Congressman Mills. Findings I, ¶ 156, IIA J.A. 253; *see id.*, ¶¶ 157, 165, IIA J.A. 253, 255. Similarly, the American Milk Producers, Inc., a large dairy cooperative, made large legal and illegal contributions to three 1972 presidential candidates—President Nixon, Senator Humphrey, and Congressman Mills. Findings I, ¶ 165, IIA J.A. 255.

The contributions of the American Medical Association (AMA) to California candidates in 1974 further illustrate that many donations are made for reasons other than ideology. The AMA gave a total of $151,165 to 29 of the 37 California House incumbents who faced major party opposition in 1974. They included 17 Republicans and 12 Democrats, ranging on the ideological spectrum from conservatives John Rousselot and Barry Goldwater, Jr. to liberals Ron Dellums and John Burton, Jr. Two challengers received AMA contributions, but in both cases the AMA gave larger contributions to the incumbents

[44] Findings IIA, ¶¶ 104, 111, IIB J.A. 467, 471-72; Affidavit of John J. Conway, Ex. E-IV to Proposed Findings of Fact of Defendants and Intervening Defendants Center for Public Financing of Elections, League of Women Voters of the United States, *et al.* (hereinafter "Proposed Findings of Defendants and Intervening Defendants"), ¶ 15.

against whom the challengers were running. In three open House races—races not involving an incumbent—both the Democratic and Republican nominees received AMA contributions; the AMA also gave significant contributions to both the Democratic and Republican nominees for the Senate. Findings IIA, ¶ 110, IIB J.A. 470.

Moreover, interest groups give heavily to legislators from both parties who are members of the congressional committees that regulate their industries. For example, during the 1974 campaign, political committees of maritime-related unions contributed $22,200 to Representative Frank Clark, Chairman of the House Merchant Marine Subcommittee, and $22,000 to Senator Russell Long, Chairman of the Senate Merchant Marine Subcommittee—who was unopposed in the general election and won his primary with 75 percent of the vote. Findings IIA, ¶ 108, IIB J.A. 469; *see id.*, ¶¶ 93-94, 105-07, 110-11; IIB J.A. 462-63, 467-69, 470-72.

Wealthy individuals with special business or personal interests follow similar practices. H. Ross Perot is the chairman of one of the largest suppliers of data processing to the Government for medicare and medicaid programs. The Ways and Means Committee has jurisdiction in the House over those programs. During the period from September 1, 1973 through December 31, 1974, Perot made personal contributions to 12 members of the House Ways and Means Committee, on both sides of the aisle, totaling $31,900. Two of the contributions were made after the election to members of the Committee who had been unopposed in the primary or general elections—Rep. Omar Burleson, who received $5,000, and Rep. Joe Waggoner, who received $5,000. In addition, Perot contributed $2,500 to Rep. James Jones and $500 to Rep. James Martin on December 30, 1974—almost two months

after the election and approximately two weeks after these two Congressmen had been named to serve on the Ways and Means Committee during the upcoming Congress. Perot also contributed $2,500 to Rep. Dan Flood, who served as Chairman of the House Appropriations Subcommittee for the Department of Health, Education, and Welfare, which administers medicare and medicaid programs.

In the Senate, the Finance Committee has jurisdiction over medicare and medicaid programs. Perot contributed $16,000 to Democratic and Republican members of the Senate Finance Committee, including $5,000 each to Senators Gravel, Packwood, and Talmadge, and $1,000 to Senator Russell Long, Chairman of the Finance Committee. In sum, Perot contributed $53,400 to 19 members of Congress associated with either the House Ways and Means Committee, the House Appropriations Subcommittee for HEW, or the Senate Finance Committee. Findings IIA, ¶¶ 93-95, IIB J.A. 462-64.

The reasons for such lavish giving are unmistakable. Indeed, Congressmen acknowledge them:

> "The link that so often exists between campaign contributions and preferential treatment by politicians was summed up by Edward Garmatz, former Maryland Congressman who had served as chairman of the Merchant Marine Committee. When questioned recently about the heavy political contributions he received from the maritime industry, he said 'Who in the hell did they expect me to get it from—the post office people, the bankers? You get it from the people you work with, who you helped in some way or another. It's only natural.' Congressman Chet Holifield expressed it another way, in speaking of lobbyists. He asserted (as quoted in the *Los Angeles Times*) that if they didn't help fill

> campaign purses 'the power of lobbyists would be practically nil.' "[45]

In this vein, Senator Biden earnestly complained:

> "All I know is that I have felt that pressure . . . , and I think that it is in the public interest to see to it that we who are running for public office can get about the business of telling the people what we think and not have to worry that if we take a position that is in opposition to any major interest group, whether it be labor or big business, that we are going to have campaign funds cut off that we need to get our case before the public."[46]

As the court of appeals noted, Senator Long was even more blunt:

> "[W]hen you are talking in terms of large campaign contributions . . . *the distinction between a campaign contribution and a bribe is almost a hair's line difference.* . . .
>
> "For example, I recall an election in my State where one man put up almost a quarter of a million dollars. He was a very fine, high type man and we passed a big tax that cost him a fortune. But we did not do that without first talking to him and saying, we think this is necessary [and] we hope you will pardon us for doing it. Frankly if he said, no, it just cannot be done, I do not know whether we would have done that or not.
>
> ". . . One sweet woman was on the opposite side and thought they were going to lose and came charg-

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[45] *Hearings on S. 372 Before the Subcomm. on Privileges and Elections, supra* note 37, at 149. Findings IIA, ¶¶ 106-08, 110-11, IIB J.A. 468-69, 470-71; *see* Findings I, ¶¶ 101-03, IIA J.A. 54-146.

[46] 119 Cong. Rec. 25985 (1973).

ing in there with a couple of hundred thousand dollars to pump up their side . . . . *Anybody who would suggest that she had no more influence than any other sweet old lady in a calico dress just does not know anything about politics.*" [47]

Pressures bear also on potential contributors. The cost of the escalating campaign "arms race," detailed below, forces candidates to seek ever greater amounts of financial support. Dependent on ever-increasing supplies of money, candidates must solicit contributions in ways and under circumstances that compromise both donors and donees. Both courts below found, as Congress did, that "big-spending campaigns pull like a magnetic field"—"a magnet for large contributions, and for circumventions." Ct. App. Op. 1516, 1541.

The testimony of corporate executives before Congress confirms that many donors feel they must respond or risk suffering unfavorable treatment at the hands of their Government. "Extortion, or practices that differ only in being more genteel, are the Janus face of undue influence by contributors." [48] George Spater, former Chairman of American Airlines, told Congress that:

> "I believe that the present system places unfair pressures both on the candidates and on corporate

[47] *Hearings on S. 3496, Amendment No. 732, S. 2006, S. 2965,* and *S. 3014 Before the Senate Comm. on Finance,* 89th Cong., 2d Sess. 78 (1966) (emphasis added), *quoted in part in* Ct. App. Op. 1514 n. 29. During the Senate debate, Senator Humphrey similarly stated:

> "Those of us who run for office can profess that the campaign contributions we receive do not in any way control our votes, but I venture to say that not many believe it." 120 Cong. Rec. S4553 (daily ed. March 27, 1974), *quoted in* Ct. App. Op. 1513 n.28.

[48] D. Adamany & G. Agree, Political Money: A Strategy for Campaign Financing in America 11 (1975).

> executives. . . . [M]ost contributions from the business community are not volunteered to seek competitive advantage but are made in response to pressure for fear of a competitive disadvantage that might result if they are not made, and the process, in my opinion, clearly degrades both the donor and the donee.
>
> • • • •
>
> "There were two aspects: Would you get something if you gave it, or would you be prevented from getting something if you didn't give it?
>
> • • • •
>
> "[I]t is something like the old medieval maps that show a flat world and then what they called 'terra incognita' with fierce animals going around the fringes of this map, you just don't know what is going to happen to you if you get off it. I think that sometimes fear of the unknown may be more terrifying than fear of the known. I think this is a very large element in the picture." [49]

Congress heard a similar explanation for Ashland Oil's illegal corporate contributions:

> "I think all we were attempting to do was to assure ourselves of a forum to be heard. . . . [W]e felt we needed something that would be sort of a calling card, something that would get us in the door and make our point of view heard.
>
> "We didn't expect those points of view to be accepted, but only from the point of view of being able to express them and that was our thinking or ra-

[49] *Hearings Before the Senate Select Comm. on Presidential Campaign Activities, supra* note 41, at 5495, 5514. *See also* Findings I, ¶ 105, IIA J.A. 147.

tionale as to why we were interested in making any type of contribution." [50]

The disclosures about the 1972 elections are painful reminders of the extent of these problems. One high campaign official, a former Cabinet member, pleaded guilty to receiving large illegal contributions from major corporations. Findings I, ¶ 112a, IIA J.A. 148. A former high official in the Humphrey campaign was recently convicted of willfully receiving such contributions. Twenty-two individuals pleaded guilty to making, conspiring to make, or aiding and abetting illegal corporate contributions to both major parties (Findings I, ¶¶ 113-14, 117h-k, IIA J.A. 148-50, 152-53); 17 corporations pleaded guilty to the same offense or conspiring to commit that offense (*id.*, ¶¶ 115, 117a-b, IIA J.A. 150-51. In addition, two corporations and one individual pleaded guilty to violating the prohibition against contributions by government contractors. Findings I, ¶¶ 116, 117f, IIA J.A. 151. Three individuals associated with large companies have pleaded guilty to concealing the identity of large individual contributors. Findings I, ¶ 117, IIA J.A. 151-53.

These abuses and questionable practices were not restricted to the 1972 election, nor—as the record plainly shows—to any one party. Recent studies have chronicled similar practices dating from the Pierce and Buchanan administrations down through the 1960's.[51] For example, in the 1896 presidential campaign, before corporate contributions were outlawed, one campaign manager simply "assessed" major corporations at the rate of one-fourth

[50] *Hearings Before the Senate Select Comm. on Presidential Campaign Activities, supra* note 41, at 5442.

[51] *See* C. V. Woodward, Responses of the Presidents to Charges of Misconduct (1974).

of one percent of their capital; they gladly contributed the assessed amounts.[52] In 1946, Truman's nomination of a former campaign treasurer for a high post faltered when the nominee was accused of trying to influence governmental decisions in favor of oil companies who were large contributors. Truman's military aide also was accused of collecting political gifts in exchange for government favors.[53] Major American corporations such as Goodyear Tire and Rubber, Ashland Oil, Gulf Oil, Minnesota Mining and Manufacturing, and Phillips Petroleum have been responding to solicitations from and making corporate contributions to both parties, at all levels of politics, for many years.[54]

Indeed, the legislative history of the Federal Corrupt Practices Act of 1925 reads as if it had been written in the past year. During debate on that law, Senator Robinson said:

[52] J. Sundquist, Dynamics of the Party System 142 (1973).

[53] C. V. Woodward, *supra* note 51, at 276, 280.

[54] Findings I, ¶¶ 119, 120, IIA J.A. 153-54; Exs. F-XXXIV and F-XXXV to Proposed Findings of Defendants and Intervening Defendants.

A report filed with the Securities and Exchange Commission by Ashland Oil lists illegal corporate contributions over a five-year period. They include very large gifts to the Democratic presidential campaign in 1968 and the Republican presidential campaigns in 1968 and 1972 and gifts of $5,000 each channeled through Carl Arnold to 10 Senate candidates, 7 Democrats and 3 Republicans. Arnold also channeled $50,000 to Wilbur Mills for use in Democratic congressional campaigns. Report of the Special Committee to the Board of Directors of Ashland Oil, Inc. (filed Aug. 9, 1975).

Appellants argue that the new law would do nothing additional to curb already illegal corporate contributions. Appellants' Br. 29, 64. However, as the Ashland report illustrates, such contributions have commonly been disguised as large individual gifts. *See also* Findings IIA, ¶ 119, IIB J.A. 508-64. The $1,000 limit on individual gifts will severely restrict this method of circumventing the ban on corporate contributions.

"We all know . . . that one of the great political evils of the time is the apparent hold on political parties which business interests and certain organizations seek and sometimes obtain by reason of liberal campaign contributions. Many believe that when an individual or association of individuals makes large contributions for the purpose of aiding candidates of political parties in winning the elections, they expect, and sometimes demand, and occasionally, at least, receive, consideration by the beneficiaries of their contributions which not infrequently is harmful to the general public interest. It is unquestionably an evil which ought to be dealt with, and dealt with intelligently and effectively." 65 Cong. Rec. 9507-08.

In 1940, Senator Bankhead sounded a similar theme:

"We all know that money is the chief source of corruption. We all know that large contributions to political campaigns . . . put the political party under obligation to the large contributors, who demand pay in the way of legislation. . . ." 86 Cong. Rec. 2720.

In 1962, President Kennedy's Commission on Campaign Costs issued a report which found that:

"We agree with President Kennedy, former President Eisenhower, and other leaders of both parties that the existing system of presidential campaign finance poses serious problems. It is not desirable to have candidates for high office, especially for President and Vice President, dependent on individuals or organizations with special interests who are willing to make large contributions in the form of cash or campaign services. As President Kennedy has stated, 'it is not healthy for the democratic process —or for the ethical standards in our government—

to keep our national candidates in [the present] condition of dependence.'

• • • •

"Under present practices, the parties encounter enormous difficulty in raising adequate funds at the proper time. Given the erratic flow of funds and the periodic crises in campaign finance, individuals and organizations providing substantial gifts at critical moments can threaten to place a candidate in moral hock. In consequence, a disturbing and fundamental failure of present practices is the widespread cynicism about the democratic system they produce." [55]

Finally, Congress was spurred by another strong consideration—it found "a definite need for effective and comprehensive legislation in this [campaign finance] area to restore and strengthen public confidence in the integrity of the political process"—confidence that had declined, in significant part, because of campaign financing abuses.[56] A survey done for the Senate Subcommittee on Intergovernmental Relations concluded:

"Public confidence in most government institutions . . . has declined drastically over the past six years.

• • • •

". . . [W]hen asked to explain their concern, one quarter of those sampled—the largest segment—volunteered the belief that 'government leaders are corrupt and immoral.'

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[55] Financing Presidential Campaigns, Report of the President's Commission on Campaign Costs 2-3, 11 (1962).

[56] H.R. Rep. No. 1239, 93d Cong., 2d Sess. 4 (1974); S. Rep. No. 689, *supra* note 35, at 4. *See* Affidavit of Arthur H. Miller, Ex. M-I to Proposed Findings of Defendants and Intervening Defendants, ¶¶ 5, 7.

> "Leaders, when asked . . . to list the 'main reasons' for the loss of confidence in public officials, overwhelmingly volunteered 'corruption, use of office and public funds for personal gain' (49% of the mentions) and 'Watergate' (28%)." [57]

A public opinion poll prepared for the Republican National Committee and released in January 1975 showed that those who believe that government is conducted for the "benefit of all the people" had declined from 64 percent in 1964 to a low of *21.3 percent* in 1974, while the percentage of people polled who believe that government is "pretty much run by a few big interests looking out for themselves" increased from 29 percent in 1964 to a high of *69.9 percent* in 1974. Findings I, ¶ 155; IIA J.A. 252-53; *see id.* ¶¶ 149-59, 171, IIA J.A. 206-53. The percentage of people who think that "hardly any" of the "people running the government are a little crooked" declined from 18.2 percent in 1964 to 9.8 percent in 1974, while the percentage who think that "quite a lot" are "crooked" increased from 28 percent in 1964 to 49.3 percent in 1974—nearly a majority of the electorate. Findings I, ¶ 155, IIA J.A. 252-53.

Louis Harris, the expert public opinion analyst, testified that "Public confidence in government generally must be reported as being lower than a constituent democracy can afford." [58] Congress found that lack of respect un-

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[57] *Confidence and Concern: Citizens View American Government, A Survey of Public Attitudes*, 93d Cong., 1st Sess. 24, 29, 46-47 (1973), Ex. M-II to Proposed Findings of Defendants and Intervening Defendants.

[58] *Hearings on a Survey of Public Attitudes Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Government Operations*, 93d Cong., 1st Sess. 6-8 (1973). *See also* Affidavit of James MacGregor Burns, Ex. H-I to Proposed Findings of Defendants and Intervening Defendants, ¶¶ 6, 8.

dermines the legitimacy of the Government in the public mind and weakens its effectiveness and the vitality of the democratic principles on which it is based.[59]

As President Ford said when he signed the FECA Amendments, "The unpleasant truth is that big money influence has come to play an unseeming role in our electoral process. This bill will help to right that wrong." [60]

B. Congress Found that the Ability of the Wealthy Few To Make Large Campaign Contributions Has Fostered Inequality Among Citizens in the Ability To Affect Electoral Choices

With no effective limits on campaign gifts, a tiny fraction of the population has furnished a grossly disproportionate share of the money used in campaigns. The power to affect electoral choices is thereby concentrated disproportionately in the wealthy few—not because of the power of their ideas but because of the power of their purses.[61] A mere one percent of the people contribute 90 percent of the money candidates receive for their campaigns. Findings I, ¶ 100, IIA J.A. 54. Donations from only 2-3 percent of the wealthiest people in the country provide about 95 percent of the financing for congressional elections.[62] In 1972, the 1254 largest contributors accounted for over $51 million of campaign

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[59] S. Rep. No. 170, 93d Cong., 1st Sess. 2 (1973). *See also* Affidavit of James MacGregor Burns, *supra* note 58, ¶¶ 7, 9-18; Affidavit of Arthur H. Miller, *supra* note 56, ¶¶ 6, 9; D. Adamany & G. Agree, *supra* note 48, at 14-15.

[60] 10 Presidential Documents 1285 (Oct. 21, 1974).

[61] *Hearings on S. 372 Before the Subcomm. on Privileges and Elections, supra* note 37, at 18, 213.

[62] 120 Cong. Rec. H7919 (daily ed. Aug. 8, 1974) (remarks of Rep. Udall).

funds. And in the 1972 presidential race alone, 153 large contributors accounted for almost $20 million of the incumbent's campaign funds—that is, one-third of his financial support was furnished by less than *one two-thousandth of one percent* of the people who voted for him and less than *one ten-thousandth of one percent* of the population.[63] By contrast, in 1975 alone, more than 32 million individuals have chosen to help finance the 1976 presidential campaigns by contributing $1 through the tax checkoff.[64]

These statistics lend substance to the popular conception that electoral politics has been a "rich man's game" and that the ordinary citizen can have little effect on elections that are dominated by wealthy contributors. That popular understanding discourages persons of modest means from participating, either through their small contributions or by more direct means. Senator Mathias testified that many persons have told him they "feel the average American has no significant role in the political process, and . . . they therefore do not participate." Mathias Affidavit, *supra* note 43, ¶ 11(b); Findings I, ¶¶ 170-71, IIA J.A. 174-75. Limits on campaign giving and spending are designed to reverse that tendency. Like earlier campaign reform statutes, their goal is

> "not merely to prevent the subversion of the integrity of the electoral process. [Their] underlying philosophy [is] to sustain the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government." *United States* v. *UAW*, 352 U.S. 567, 575 (1957).

[63] Citizens' Research Foundation, Political Contributors and Lenders of $10,000 or More in 1972 (1975); H. Alexander, Financing the 1972 Election 12, 641 (forthcoming D.C. Heath & Co. 1976) (page citations are to the typescript, with the author's permission).

[64] Federal Election Commission, Press Release (Oct. 15, 1975).

C. Congress Found that the High—and Rising—Cost of Campaigning Has Tended To Close Politics to Candidates and Parties Who Lack Access to Large Sources of Wealth

Congress found that federal election campaigns have become enormously expensive and that the costs of conducting such campaigns are increasing at an "alarming" rate.[65] An estimated $400 million was spent in 1972 for nomination and election campaigns—a 33 percent increase over 1968 and almost a 300 percent increase since 1952.[66] Over the same periods, the consumer price index rose only 20.3 percent from 1968 to 1972 and only 57.6 percent from 1952 to 1972.[67]

In 1972, presidential campaign spending alone totaled $94.4 million—up 85 percent from $56.4 million in 1968; up 147 percent from $38.1 million in 1964; and up 210 percent from $27.2 million in 1960. Findings IIA, ¶ 51, IIB J.A. 451; Findings I, ¶ 89, IIA J.A. 49-51. During the same 12-year period, the consumer price index rose only 41.3 percent. Findings I, ¶ 11, IIA J.A. 9. In House

[65] H.R. Rep. No. 1239, *supra* note 56, at 3; S. Rep. No. 170, *supra* note 59, at 1-2; S. Rep. No. 689, *supra* note 35, at 5; Findings I, ¶¶ 88, 89, 93-95, IIA J.A. 49-51, 53.

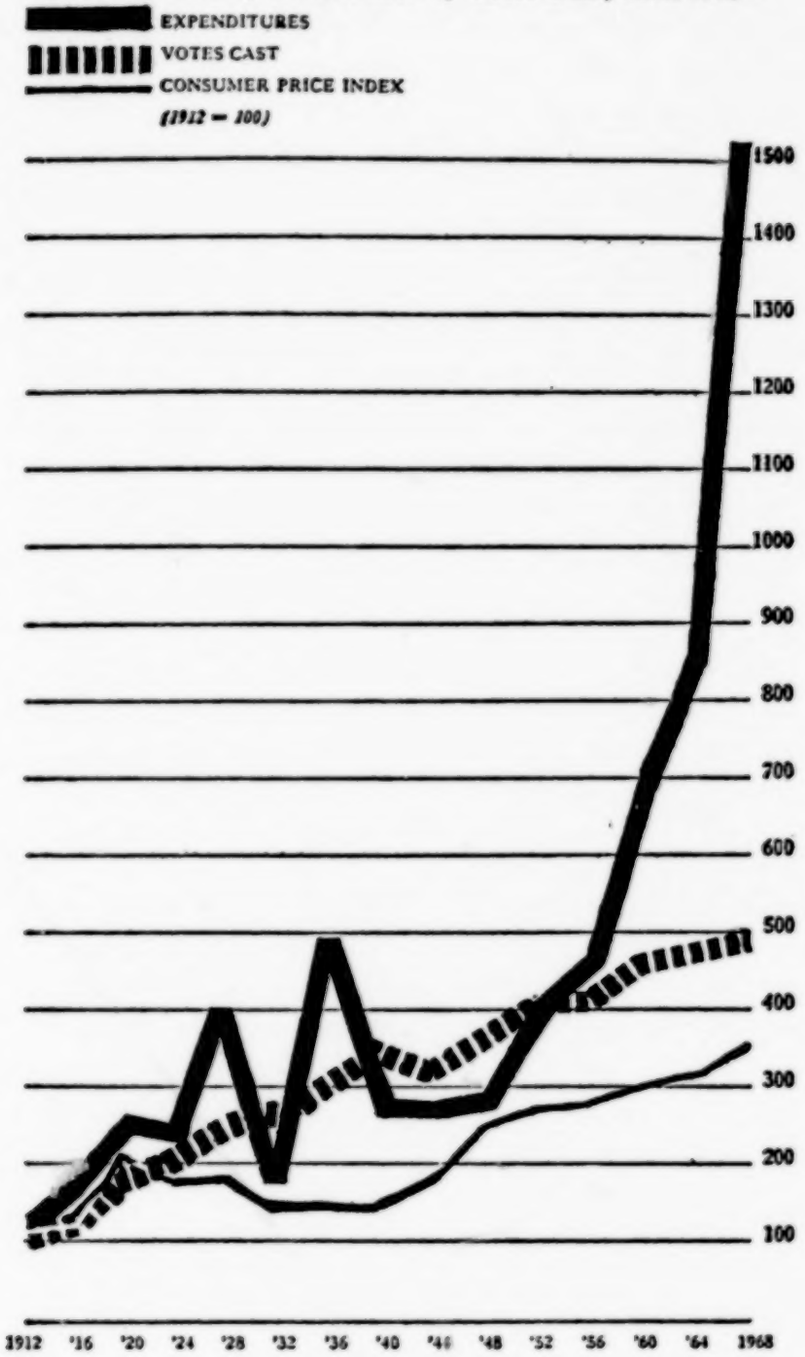
[66] *Hearings on S. 372 Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 93d Cong., 1st Sess. 219 (1973); Findings I, ¶ 93, IIA J.A. 53.

[67] U.S. Dep't of Labor, Bureau of Labor Statistics, Consumer Price Index for Wage Earners and Clerical Workers, U.S. City Average All Items, Series A. Appellants suggest that rising campaign costs are properly compared to the increase in the gross national product. Appellants' Br. 57. The comparison is misleading. The GNP is not a measure of inflation, but rather a measure of the total value of goods and services produced, which reflects changes in the productivity and size of the work force. In contrast, the CPI measures the increases in the prices of a "standard market basket" of goods and services—and is the standard used by the Department of Labor and the Bureau of Labor Statistics to measure inflation.

and Senate races, campaign spending increased 48 percent between 1968 and 1970; 35 percent between 1966 and 1968; 36 percent between 1964 and 1966; and 10 percent between 1962 and 1964.[68] The following graph shows this accelerating trend:

[68] H.R. Rep. No. 1239, *supra* note 56, at 3. *See* Findings IIA, ¶¶ 5-11, IIA J.A. 326-94, IIB J.A. 395-441, which reflect the most expensive House and Senate races in 1972 and the most expensive House races in 1974. *See also id.*, ¶¶ 3-6, IIA J.A. 269-394.

Indexes of Direct Campaign Expenditures by National Level Committees, Consumer Prices, and Number of Votes Cast, 1912-1968 [69]



[69] *Hearings on S.372 Before the Subcomm. on Communications*, *supra* note 66, at 276.

Candidates feel they must try to match spending increases by their opponents or suffer a competitive disadvantage. Each side escalates in an "arms race" that neither can control. A good example of the tendency of a campaign to raise and spend as much as possible—even more than is necessary to win—is presented by President Nixon's 1972 reelection effort. Maurice Stans, Chairman of the Finance Committee to Re-Elect the President, testified before the Senate that in his opinion the 1972 Nixon campaign spent more than was necessary:

> "I thought . . . originally that in the President's position he could be reelected for 25 or 30 million dollars and when they came to me with budgets of 40 million dollars which were incomplete, and higher amounts, I objected very strenuously. I insisted that there was overkill in the budget in the sense that they were spending money for massive amounts of direct mail, massive amounts of telephoning, massive amounts of advertising that just were duplicating each other." [70]

Congress found that as a result of rising campaign expenditures, much of the electorate has come to believe that candidates can "buy" an election by simply outspending their opponents in a campaign, and that candidates with wealthy or special interest supporters therefore have a decided advantage in federal elections.[71] Obviously, where such an impression exists, public confidence in elected representatives deteriorates. *See* Findings I, ¶¶ 149-55, IIA J.A. 206-53.

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[70] *Hearings Before the Senate Select Comm. on Presidential Campaign Activities*, *supra* note 41, at 715.

[71] H.R. Rep. No. 1239, *supra* note 56, at 3.

Candidates must raise larger and larger sums of money in order to match the ever more expensive campaigns of their opponents. Findings I, ¶ 97, IIA J.A. 54. Congress found that in order to raise these sums, candidates from all parties have increasingly relied on large contributions from monied and special interests."[72] Potential candidates who lack access to large sources of wealth—or who are unwilling to incur obligations to large contributors—face an extreme competitive disadvantage. The testimony of a former presidential campaign finance chairman illustrates this phenomenon:

> "[W]e know there was fund raising being done at the local level by the state committees, through the store-front offices and women's clubs and all that sort of thing.
>
> "Now, from my 1968 experience, we knew that there was absolutely no possibility of raising $40 million by that kind of effort because the average contribution that came through those programs was less than $25, we had to find ways of tapping larger sources and this meant to people who had means to contribute more.
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> • • • •
>
> ". . . [W]here we had to look for the major source of money was to the people of wealth, the people of means, who were willing and able to contribute more of what they had in proportion to their wealth.
>
> "It was by that means that we were able to reach something like 75 people who gave $100,000 or more." [73]

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[72] H.R. Rep. No. 1239, *supra* note 56, at 3; 120 Cong. Rec. H7922 (daily ed. Aug. 8, 1974) (remarks of Rep. Anderson); Findings I, ¶ 69, IIA J.A. 32.

[73] *United States* v. *Mitchell and Stans*, 73 Cr. 439, Tr. at 8202-04 (S.D.N.Y. April 17 and 18, 1974) (testimony of Maurice H. Stans); Findings I, ¶ 98, IIA J.A. 54; *see* Findings IIA, ¶ 119, IIB J.A. 508-64.

This rising thirst for money has forced candidates to divert time and energy to fund-raising activities and away from other activities, such as addressing the substantive issues, that do not fill campaign coffers.[74] Joseph Cole, who was National Finance Chairman of the Democratic National Committee, vividly recounted the effects of the pressure to raise money on candidates in a passage quoted by the court of appeals:

> ". . . I have been close to four or five Presidential campaigns . . . . I have sat next to the Presidential candidate, who was tired, who was weary and concerned with the issues and not able to handle them, not able to prepare, not able to think about them because he has to go downstairs at 7 in the morning to shake hands with a guy from whom he may get a large contribution.
>
> "It goes on all day long and all night long, and I was asked at the Senate hearings how much time do you think a Presidential candidate spends on fund-raising? And I said at least 70 percent of his time, and I think all of his waking hours. It is really demeaning, demeaning to go through it." [75]

Senator Humphrey, a veteran of four national campaigns, agrees:

> "Campaign financing is a curse. It's the most disgusting, demeaning, disenchanting, debilitating experience of a politician's life. It's stinky, it's lousy. I just can't tell you how much I hate it. I've had to

[74] *See Hearings on S. 372 Before the Subcomm. on Privileges and Elections, supra* note 37, at 78 (testimony of Sen. Hollings); *Hearings on S. 1103, supra* note 36, at 207 (testimony of Sen. Clark); Findings I, ¶ 170, IIA J.A. 256.

[75] *Hearings on H.R. 7612 and S. 372 Before the Subcomm. on Elections of the House Comm. on House Administration*, 93d Cong., 1st Sess. 138 (1973), *quoted in* Ct. App. Op. 1513 n.27.

> break off in the middle of trying to make a decent, honorable campaign and go up to somebody's parlor or to a room and say, 'Gentlemen, and ladies, I'm desperate. You've got to help me. My campaign chairman is here and I'm going to step out of the room.' You even have to go through all that kind of fakery. You ask'em and you just have to feel like a louse. When you are desperate, these are the things you just have to do." [76]

The high price of campaigning thus has become a barrier to the candidacies of persons who lack great wealth or access to it.[77] Congress concluded that the range of potential candidates for federal office was steadily being reduced to the friends of the wealthy and the very wealthy themselves. Candidates who could pump tremendous personal and family fortunes into their campaigns have become increasingly predominant in federal elections. Vice President Rockefeller's stepmother alone contributed almost $1.5 million to his 1968 Republican presidential nomination effort.[78] "In the Nation's seven largest States in 1970, 11 of the 15 major senatorial candidates were millionaires. The four who were not millionaires lost their bid for election." 117 Cong. Rec. H42065 (daily ed., Nov. 18, 1971) (remarks of Rep. MacDonald of Massachusetts); *see* A. Reitman & R. Davidson, The Election Process: Voting Laws & Procedures 89 (1972); 1970 *Cong. Q.* 2059-63 (Aug. 14, 1970).

As Senator Biden said on the Senate floor, remedies were needed that would

[76] *Quoted in* The New York Times, Oct. 13, 1974, § 4, at 18, col. 1.

[77] D. Dunn, *supra* note 34, at 11-14; Ct. App. Op. 1539.

[78] D. Dunn, *supra* note 34, at 13.

"allow candidates—incumbents and challengers alike —to compete more on the basis of merit than on the size of the pocketbook—free from potentially corroding dependence on personal or family fortune or the gifts of special interest backers—be they those of business, organized labor or conservative or liberal interests." 119 Cong. Rec. S14724 (daily ed. July 25, 1973).

IV. THE FIRST AMENDMENT PERMITS CONGRESS TO IMPOSE SOME REASONABLE LIMITS ON CAMPAIGN CONTRIBUTIONS AND EXPENDITURES

Appellants argue that the First Amendment forbids Congress to impose *any* limits on campaign giving and spending. They further argue that, even assuming the power to set some limits, the particular limits Congress chose are unreasonable and discriminatory. We deal here with appellants' broad denial of congressional power in this area. In Part V, we answer their attack on the specific limits Congress set.

Contribution and expenditure limits are aimed at the adverse effects of unlimited money, not at any effect of unlimited speech. Of course, to restrict what candidates and their supporters may spend to win elections can have incidental effects on political speech and association. However, that conclusion does not end the analysis, but only begins it.

In *United States* v. *O'Brien*, 391 U.S. 367 (1968), this Court summarized the test for determining the permissibility of laws—such as these—that do not have the purpose of limiting speech but that incidentally impinge on First Amendment interests:

> "To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* at 376-77 (footnotes omitted).

See also Broadrick v. *Oklahoma*, 413 U.S. 601, 611-12 (1973). Each element of the test is clearly met in this case.

We have shown that regulation of federal elections is clearly "within the constitutional power of Government." Part II, *supra*.

The interests served by campaign giving and spending limits, described in Part III, are the most compelling interests in a representative democracy. Foremost is the interest in curbing the corrupting influence of large contributions on candidates and elected officials and eliminating the appearance of such influence. Ancillary to that are the related needs to reduce the disproportionate power of the wealthy to affect electoral choices, and to reduce financial barriers to candidacy.

These public interests plainly are "unrelated to the suppression of free expression." Appellants assert that the evils attacked by giving and spending limits grow out of "too much communication" and that the limits achieve their goals by restricting communication. Appellants' Br. 79-86, 116-27; *see* United States' *Amicus* Br. 26-27. That view is based on a fundamental misconception of the

ways in which money has harmed the electoral process and the ways in which the limits will remedy those harms. We will show that the harms result directly from unlimited money, not from unlimited speech, and that the limits will achieve their goals wholly apart from any effect on communication.

Finally, we will show that giving and spending limits are not unnecessarily restrictive means of achieving the legislative goals.

A. Giving and Spending Limits Serve Compelling First Amendment and Other Interests in Protecting the Integrity of the Electoral Process

The compelling need to remedy campaign financing abuses derives not only from Articles I and II but also from the First Amendment. That amendment protects a cluster of related and sometimes competing values. Accommodation among those competing values is essential to preserve the matrix of our democratic system. *See* A. Bickel, The Morality of Consent (1975); T. Emerson, *supra* note 31, at 3-20, 627-30. We believe that giving and spending limits clearly promote, rather than infringe, the values embodied in the First Amendment.

This Court's decisions affirm that the First Amendment is not a simple absolute. "Neither the right to associate nor the right to participate in political activities is absolute . . . ." *Civil Service Commission* v. *Letter Carriers*, 413 U.S. 548, 567 (1973). Even where First Amendment interests are pitted against *unrelated* governmental interests, this Court has made clear that accommodation of the competing interests is necessary. If the countervailing governmental interest is compelling, laws that incidentally impinge on free expression may be upheld. *E.g.*, *United States* v. *O'Brien*, 391 U.S. 367, 376-77 (1968); *Broadrick* v. *Oklahoma*, 413 U.S. 601, 611-12 (1973).

The need for accommodation is much more obvious where, as here, First Amendment values lie on both sides of the case. There may be a First Amendment interest in allowing a reasonable amount of campaign giving and spending, but there is an equally compelling First Amendment interest in preventing the excessive use of money from distorting and defeating the democratic process. In Professor Freund's words,

> "We are dealing here on the one hand with the right to speak fully and freely and on the other with the right of equality, the right of access to the media, the right of the electorate not to have their representative or their president unduly beholden to a particular interest because of campaign obligations. . . ." [79]

The issue posed by legislation "designed to purify the democratic process" is, according to Professor Emerson,

> "not the reconciliation of freedom of expression with another kind of interest but the reconciliation of opposing interests within the system of free expression itself." T. Emerson, Toward a General Theory of the First Amendment 103-04 (1966).[80]

Emerson concludes that the First Amendment permits Congress to impose "certain restraints on expenditure of money in political campaigns or in direct contacts with the legislature." *Id.* at 104-05.

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[79] Freund, *supra* note 31, at 72-73. *See also* Note, *Campaign Spending Controls Under the Federal Election Campaign Act of 1971*, 8 Colum. J.L. & S.P. 285, 302 (1972); Comment, *Free Speech Implications of Campaign Expenditure Ceilings*, 7 Harv. Civ. Rights-Civ. Lib. L. Rev. 214, 223-24 (1972).

[80] *See* T. Emerson, *supra* note 31, at 629; Redish, *Campaign Spending Laws and the First Amendment*, 46 N.Y.U.L. Rev. 900, 907 (1971).

A primary purpose for the First Amendment's protection of free expression is to make democracy practicable. The goal is "producing an informed public capable of conducting its own affairs." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 392 (1969). As Alexander Bickel has said:

> "The social interest that the First Amendment vindicates is . . . the interest in the successful operation of the political process, so that the country may better be able to adopt the course of action that conforms to the wishes of the greatest number, whether or not it is wise or is founded in truth." A. Bickel, *supra* p. 76, at 62.

Self-expression as an aid to self-government is "the central meaning" of the First Amendment [81] and a keystone of our democratic system.

Many federal laws—such as the laws forbidding vote-buying, 18 U.S.C. § 597, and intimidation of voters, 18 U.S.C. § 594—are designed to prevent subversion of the democratic process. State laws constitutionally forbid electioneering at or adjacent to the polls. All such laws restrict behavior that might be called speech, assembly, or petition and considered protected by the First Amendment; but they do so to achieve the First Amendment goal of choosing our elected representatives through a free and informed suffrage.

Without such laws, we might have utter political license but we would not have a working representative democ-

[81] *See, e.g.*, Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 Sup. Ct. Rev. 191; Meiklejohn, *The First Amendment is an Absolute*, 1961 Sup. Ct. Rev. 245.

racy. Laws such as these—including the challenged statutes—bring the reality of the electoral process closer to its ideal. They do not hinder, they promote the fundamental goals of the First Amendment.

Such laws also promote other constitutional values. Articles I and II establish the legislative and executive branches of the Government and provide for the methods of selection of Senators, Congressmen, and the President and Vice President. The provisions prescribing the manner of choosing these federal officers have been modified and supplemented by the Twelfth, Fourteenth, Seventeenth, Twentieth, Twenty-Third, and Twenty-Fifth Amendments. The Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments have successively expanded the franchise. Each of these constitutional provisions presupposes that Congress can and will enact the laws necessary to assure that the elections in which legislative and executive officers are chosen will be fair and open.

The challenged laws are such laws. They will help to make elections in practice what they are in constitutional text and theory: a means by which the voters can choose their leaders and the directions their Government will take, with each voter having an equal say in the choices.

1. *Giving and Spending Limits Will Protect Candidates and Elected Officials Against Improper Influence*

The cardinal objective of giving and spending limits is to reduce the temptation for candidates to seek the favor of large contributors, and thus to do away with the improper influence of large campaign donors on those who win elections. Our elected representatives will be better able to respond to the views and petitions of all their

constituents if they are less dependent on monied special interests to win or retain their seats.[82]

Without giving and spending limits, few politicians can afford to end their courtship of large contributors. The limits in the new laws give candidates this freedom. The candidates are now freed to turn much of their own time from "courting . . . one individual for days or months in the hope of getting $15,000 or $20,000" to the substance of the campaign, while their staffs canvass more broadly for small contributions.[83] Candidates are also freed to frame their campaign positions—and their policies once they are elected—to suit the views of all constituents, not merely a few large givers.

Moreover, even if politicians were able to resist the temptation to favor their large financial backers, this Court has recognized the public interest in preventing the appearance of such favor—in "protect[ing] the [electoral] process from being misjudged in the minds of the public."[84] The Court has said:

> "[I]t is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent." [85]

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[82] H.R. Rep. No. 1239, *supra* note 56, at 13; Findings I, ¶¶ 108, 110, 176, IIA J.A. 147-48, 258.

[83] Witcover, "New Campaign Fund Law Already Making Critical Impact," The Washington Post, March 15, 1975, at A3, col. 3.

[84] *Cox* v. *Louisiana*, 379 U.S. 559, 565 (1965).

[85] *Civil Service Comm'n* v. *Letter Carriers*, 413 U.S. 548, 565 (1973).

2. *Giving and Spending Limits Will Help To Equalize the Ability of All Citizens To Participate Effectively in Elections*

Giving and spending limits will also help to equalize the ability of all citizens to participate in elections and affect the choices available in them. Our constitutional system is based on the precept that citizens of unequal wealth are entitled to an equal say in electing national leaders and in urging their views on those elected after they take office. "Wealth . . . is not germane to one's ability to participate intelligently in the electoral process." *Harper* v. *Virginia Board of Elections*, 383 U.S. 663, 668 (1966). Of course, individuals are unequal in traits other than wealth—they are not equally endowed with intelligence, persuasiveness, lung-power, or free time. But, unlike wealth, there are natural limits on these other advantages:

> "Men may not be equal in lung-power, but even Senate filibusters reveal that the capacity of any man to speak is finite. However, the things that unlimited sums of money can buy—recordings, sound trucks, the speeches of others, radio and television programs—are subject to no comparable human limit." [86]

The political inequality produced by great disparities in wealth, if left unregulated, would upset the premises on which our democracy is based.[87] There is a marked

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[86] A. Rosenthal, *supra* note 31, at 21.

[87] R. Dahl, After the Revolution? Authority in a Good Society 106-07, 110-15 (1970); A. Okun, Equality and Efficiency: The Big Tradeoff 22-25 (1975); D. Adamany & G. Agree, *supra* note 48, at 2-4, 8 (1975).

Appellants assert that, since not all rich people think alike, rich people can be relied on to be the "representatives" of the unwealthy

correlation between the decline in citizen participation in the political process and the increase in citizen belief that government is controlled by monied and special interests.[88] Democratic government is endangered if the many stop participating because they believe the wealthy few determine what the choices will be.

In limiting the size of contributions, Congress took a historic step toward disestablishing wealth as a basis for political power and preference. It has not removed the disparities of wealth, but it has broken the link of mutual attraction between great wealth and candidates for elected office that gives the possessors of such wealth a disproportionate impact on the course of public affairs.

That such congressional action is permissible is shown by this Court's decisions abolishing other voting inequalities. Direct restrictions on the right to vote based on wealth—such as poll taxes[89] or property qualifications[90]—are un-

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and to promote their interests. Appellants' Br. 61-62, 121-22. John Stuart Mill answered that assertion in 1861:

> "[I]n order to support the claim of all to participate in the sovereign power[,] [w]e need not suppose that when power resides in an exclusive class, that class will knowingly and deliberately sacrifice the other classes to themselves: it suffices that, in the absence of its natural defenders, the interest of the excluded is always in danger of being overlooked; and, when looked at, is seen with very different eyes from those of the persons whom it directly concerns."

Considerations on Representative Government, in The Philosophy of John Stuart Mill 409-10 (M. Cohen ed. 1961). Our nation was founded on the principle that even the unwealthy are entitled to elect those who will be their representatives.

[88] *See* Findings I, ¶¶ 150-52, 154-55, IIA J.A. 206-14, 217-53; Affidavit of James MacGregor Burns, *supra* note 58, ¶¶ 6-9.

[89] *See* Twenty-Fourth Amendment (abolishing poll tax in federal elections); *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663 (1966) (poll tax held unconstitutional in state elections).

[90] *Cipriano* v. *Houma*, 395 U.S. 701 (1969); *Phoenix* v. *Kolodziejski*, 399 U.S. 204 (1970). "Any unjustified discrimination in

constitutional. Even where the right to vote is not actually denied, laws that create inequalities in voting power have been held unconstitutional. The reapportionment decisions protect equality of voting power against quantitative dilution through malapportionment.[91] And the Court held in *Bullock* v. *Carter*, 405 U.S. 134 (1972), that laws creating "disparity in voting power based on wealth" also are impermissible under the Equal Protection Clause.

Bullock was a challenge to a state election law that required candidates in primary elections to pay large fees—ranging up to $8,900—to have their names placed on the ballot. The Court unanimously invalidated the state law, holding that it impermissibly increased the political power of wealthy candidates and wealthy voters:

> "Many political office seekers lacking both personal wealth and affluent backers are in every practical sense precluded from seeking the nomination of their chosen party, no matter how qualified they might be, and no matter how broad or enthusiastic their popular support. . . . [T]here is the obvious likelihood that this limitation would fall more heavily on the less affluent segment of the community, whose favorites may be unable to pay the large costs required by the Texas system. To the extent that the system requires candidates to rely on contributions from voters in order to pay the assessments, . . . it tends

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determining who may participate in political affairs . . . undermines the legitimacy of representative government." *Kramer* v. *Union Free School Dist.* 395 U.S. 621, 626 (1969).

[91] *See, e.g., Reynolds* v. *Sims*, 377 U.S. 533, 562 (1964); *Wesberry* v. *Sanders*, 376 U.S. 1 (1964).

> to deny some voters the opportunity to vote for a candidate of their choosing; at the same time it gives the affluent a power to place on the ballot their own names or the names of persons they favor . . . [thus creating a] disparity in voting power based on wealth . . . ." 405 U.S. at 144.

The Court struck down the law on the ground that it impermissibly

> "utilizes the criterion of ability to pay as a condition to being on the ballot, thus excluding some candidates otherwise qualified and denying an undetermined number of voters the opportunity to vote for candidates of their choice." *Id.* at 149.

The court of appeals found those decisions apposite here:

> "It would be strange indeed if, by extrapolation outward from the basic rights of individuals, the wealthy few could claim a constitutional guarantee to a stronger political voice than the unwealthy many because they are able to give and spend more money, and because the amounts they give and spend cannot be limited." Ct. App. Op. 1517.

Appellants argue that these decisions are irrelevant because they held unconstitutional government-imposed disabilities based on wealth. Appellants' Br. 119-20. But we do not argue that the inequality flowing from large contributions is unconstitutional—only that, as these cases show, laws reducing that inequality help to effectuate the First Amendment. The Constitution does not require Congress to eliminate disparities in political power resulting from disparities in wealth, but it permits Congress to do so.

> "If financial barriers to the right to vote are constitutionally forbidden, there is a legitimate argument that reduction of financial barriers to the right to influence voters is constitutionally *permitted*. And if the Constitution requires that each man's vote count equally, may not that fact be deemed pertinent in consideration of the validity of measures intended to reduce inequalities in men's opportunities to affect the vote."[92]

Giving and spending limits, by reducing the power of "big money," stimulate political participation by ordinary citizens. The record in this case shows how effective the challenged statutes already have been in that regard. In past years, only a tiny fraction of Americans have contributed most of the money used in political campaigns. Pp. 65-66, *supra*. These limits have begun to change that phenomenon.

Ordinary people have been encouraged to make gifts that will not be dwarfed by huge contributions. Candidates who voluntarily limited gifts to their campaigns before the legal limits became effective received many contributions from persons who had never before given to a candidate.[93] And this new interest of small givers

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[92] A. Rosenthal, *supra* note 31, at 24 (emphasis in original); *see* Nicholson, *Campaign Financing and Equal Protection*, 26 Stan. L. Rev. 815, 840 (1974).

[93] *See* the experiences of Ramsey Clark and Senator Mathias, Findings I, ¶¶ 173-78, 182-87, IIA J.A. 257-59, 260-62. Senator Mathias received letters showing vividly the impact of his contribution limit. For example:

> "Enclosed is a check for $10. I cannot contribute more, as I am a student paying my own tuition and I have very little income. But I strongly support your commitment to finance your campaign without submitting to the influence of large contributors."
>
> "I approve of and commend Senator Mathias' efforts to reform our campaign laws, so that politics in America need not

has continued, as shown by the impressive fund-raising records of candidates for the Presidency in 1976[94] and by the success of the dollar check-off to the Presidential Election Campaign Fund.[95] After the special Senate election held recently in New Hampshire, former Congressman Wyman's campaign manager said:

> "In the old days, we could have tapped a few contributors for $10,000 each and taken care of financing. The law forced us . . . to broaden our base with smaller contributions. That was clearly the intent of the law."[96]

3. *Giving and Spending Limits Will Lower the Financial Barrier to the Entry of Additional Candidates and Parties*

The barrier to entry posed by high campaign costs harms not only the candidates who are excluded. It also impoverishes the nation's political discourse, harming all who might have responded to a new political voice. Giving and spending limits will help to increase both the

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be dominated by the very rich and the corrupt. I am enclosing my check for $50.00 to advance this cause. The only stipulation which I place on this contribution is that it be returned to me in the event that Senator Mathias abandons these guidelines during the campaign. In return I pledge that should you notify me that this 1974 campaign is in financial difficulty, I shall contribute an additional $50.00."

"Your action concerning fund raising for your coming campaign is most impressive and a giant step in the right direction. It is also an excellent example for your colleagues. Therefore, for the first time in my life, I am making a political contribution." Mathias Affidavit, *supra* note 43, ¶ 18.

[94] Findings I, ¶ 166 (Rep. Morris K. Udall); *id.* ¶ 196, IIA J.A. 263-64; *see* pp. 122-23, *infra*.

[95] *See* p. 185, *infra*.

[96] The New York Times, Sept. 22, 1975, at 12, col. 3.

number and the diversity of voices heard in politics by removing access to wealth as a qualification for office.

This Court confirmed the importance of that objective in *Bullock* v. *Carter*, 405 U.S. 134 (1972). As noted above, it held that one impermissible feature of the large filing fees was that unwealthy candidates were "in every practical sense precluded from seeking the nomination of their chosen party." *Id.* at 143. High campaign costs are just as preclusive. "[T]he task of fund raising frequently appears hopeless to well-qualified candidates who wish to advance a program or to challenge the record of an incumbent." D. Adamany and G. Agree, *supra* note 48, at 21.[97] Applying *Bullock*, the Court has held that a state may not exclude an indigent candidate from the ballot for failure to pay even a modest filing fee. *Lubin* v. *Panish*, 415 U.S. 709 (1974).

Spending limits are the only way to slow the meteoric rise of campaign costs. The FECA of 1971 was in effect for the 1972 and 1974 elections but did not halt the campaign arms race. H.R. Rep. No. 1239, *supra* note 56, at 3; S. Rep. No. 170, *supra* note 59, at 1-2. Limits on spending that apply equally to all candidates in a race will free the candidates from monetary one-upmanship and open the field to a greater number of candidates. The Wisconsin Supreme Court relied on these considerations in upholding that state's spending ceilings for state candidates.[98]

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[97] Indeed, the record in this case suggests that two of the appellant political parties consider a potential candidate's access to wealth as a factor in their decision to nominate him. *See* Mahoney Deposition Tr. at 35-36 (Conservative Party of the State of New York); Crane Deposition Tr. at 28-29 (Libertarian Party).

[98] *State* v. *Kohler*, 200 Wis. 518, 228 N.W. 895 (1930).

The first salutary results can already be seen in the unusual number of candidates actively seeking the Presidency in 1976. See pp. 122-23, *infra*. At least one of them has described the new giving and spending limits as making it possible for members of the House of Representatives to compete effectively with the Senators and governors who have traditionally dominated presidential elections. Affidavit of Morris K. Udall, ¶ 7.

In sum, far from suppressing political activity, giving and spending limits are a political Magna Carta for the many persons whose political activity and influence was previously eclipsed by the spending power of the wealthy few.[99]

B. Reasonable Giving and Spending Limits Will Not Restrict Freedom of Expression

Appellants argue that Congress may not limit campaign giving or spending because such activities are "pure speech." They reason that some forms of political speech require that money be spent for drafting, printing, mailing, or broadcasting, and that any limits whatever on the amounts spent for such purposes unconstitutionally abridge the right of free speech itself. Appellants' Br. 48. Similarly, the United States as *Amicus* asserts that giving and spending limits are restrictions on speech because, "Many if not most of the benefits attributed to

[99] The American Bar Association Special Committee on Election Reform has adopted a Resolution and Report endorsing legislation to limit "[c]ampaign contributions . . . to reasonable amounts." Resolution 125A (Aug. 1975). Appellants assert that the Special Committee "substantially adopt[s] appellants' views." Appellants' Br. 75 n.7. That is not true. The Resolution and Report endorse contribution limits, disclosure, the independent Federal Election Commission, and the concept of public financing.

FECA stem directly from its impact upon communication." United States *Amicus* Br. 26.

Those arguments misconceive the manner in which untrammeled money has harmed the electoral process. They also misconceive the means by which giving and spending limits will accomplish their purposes.

Giving and spending limits are aimed at the harmful effects of unlimited money—effects that occur regardless of whether the money is spent to disseminate speech. The influence of large contributions on candidates and elected officials occurs without regard to any speech of the donor or the recipient. Such contributions influence their recipients not because they create communication but because they create an improper obligation in favor of the donors—in appellants' words, "the activity brings about results other than those which stem from persuasion." Appellants' Br. 52. Candidates and elected officials favor their large contributors simply because they dare not bite the hand that feeds them. That conflict of interest thwarts the electoral process by preventing candidates and officials from responding to the views of the many constituents who are not large donors.

As Professor Freund has said, large contributors "are in a position of exerting influence through wealth. . . . They are operating vicariously through the power of their purse, rather than through the power of their ideas"—an activity that ranks "lower in the hierarchy of First Amendment values" than speech itself.[100]

Similarly, large donors wield disproportionate power over elections not because their speech or their viewpoint is more persuasive but—as the Government as *Amicus*

[100] Freund, *supra* note 31, at 74.

recognizes—"because it has the most money behind it." United States *Amicus* Br. 32. And rising campaign costs are harmful not because they create communication but because they create an incentive to obtain ever greater amounts of contributions and a barrier to the entry of otherwise qualified candidates.[101] In short, none of the harms at which these limits aim arises from the fact that the person regulated is communicating, or from the effect of his message on his audience. The ill effects to be prevented would arise even if the giver's or spender's conduct had no communicative element whatever.

Giving and spending limits correct these evils by removing the corrosive effects of money itself. They are not censorial—any effect on communication is incidental, not the means by which the limits accomplish their goals. An illustration of this fact is provided by the Federal Communications Commission's recent ruling that the "equal time" rule of the Communications Act does not apply to candidate press conferences or debates between candidates.[102] By removing an obstacle to broadcast coverage of those events, the ruling will produce a wider reach for candidate speech on electoral matters at no cost to candidates or their supporters. It will do so without in any way frustrating the objectives of the new giving and spending limits. Thus, it illustrates that the limits do not depend on curtailment of speech to accomplish their goals.

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[101] *See* Comment, *Free Speech Implications of Campaign Expenditure Ceilings*, *supra* note 79, at 216; Note, *Campaign Spending Regulation: The Failure of the First Step*, 8 Harv. J. Legis. 640, 644 (1971).

[102] *In re Petitions of Aspen Institute Program on Communication & Society, et al.*, FCC 75-1090 (Mem. Op. & Order, Sept. 25, 1975), *pet'n for review filed*, No. 75-1951, D.C. Cir., Sept. 26, 1975.

Congress was not concerned about the consequences of anyone's words or ideas but about the effects of large donations and rising costs themselves. By removing those effects, the limits free candidates and elected officials to be *more* responsive to the ideas of all, according to their merit. Monetary limits attack the effects of money at their source; as the Government's *Amicus* Brief says of the draft-card law in *O'Brien*, "every one of [their] goals . . . could be achieved without regard to any effect upon communication." United States *Amicus* Br. 27.[103]

Thomas v. *Collins*, 323 U.S. 516 (1945), and *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), cited in the Government's *Amicus* Brief at 32-34, are therefore inapposite. Both cases disapproved prohibitions *against speech itself*, which were based on the "bad" economic motivations of the speakers. Limits on campaign giving and spending forbid no speech; they leave everyone free to speak his mind in campaigns, regardless of his motivations. They merely limit the use of money in campaigns—regardless of whether it is used in connection with speech and again regardless of motivations—because of the proven evils attributable to the money itself.[104]

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[103] *See* Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482, 1496-97 (1975).

[104] The Government's *Amicus* Brief (at 37-41) suggests that the limits are intended to prevent people from being "annoyed by 'excessive' costly communication" because it is "noisy" or "drowns out" other speakers—an interest that might be viewed as relating to the suppression of at least the quantity of communication itself. Likewise, appellants assert that the limits are designed to prevent "too much communication." Appellants' Br. 80. However, reducing "noisy" or "excessive" communication is not a goal of these limits.

As the legislative record shows, Congress was concerned about the effects of money, regardless of its relation to communication.

For similar reasons, appellants and the Government's *Amicus* brief also misjudge the relevance of this Court's decisions striking down restrictions on the press. Appellants' Br. 47, 81, 118-19; United States *Amicus* Br. 12-13, 16, 44, 47. The prohibition of election-day campaign editorials voided in *Mills* v. *Alabama*, 384 U.S. 214 (1966), was a direct restriction on expression by the press. Appellants assert that, if it had been a ban on spending money to publish election-day editorials, it would be indistinguishable from the spending limits challenged here. The analogy is only superficial. A spending ban imposed for a purpose that could only be achieved by suppressing the editorials might be as invalid as the law struck down in *Mills*. But the spending limits in these laws can accomplish their ends without regard to whether they keep anyone from speaking. They attack ill effects of spending unrelated to speech. And, as noted below, they are carefully drafted to avoid any restriction on the press.

Grosjean v. *American Press Co.*, 297 U.S. 233 (1936), is equally inapposite. The Court there voided a special tax on newspapers which had "a long history of hostile misuse against the freedom of the press" and was a "deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties." *Id.* at 250. In effect, the tax was a regulation of content, applying almost wholly to those newspapers in Louisiana which were opposed to the political regime then in

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And the court of appeals never mentioned "noisiness" as a justification for the limits. *Kovacs* v. *Cooper*, 336 U.S. 77 (1949), discussed *infra*, is relevant not because these statutes share its concern about the "noisiness" of speech but because *Kovacs* illustrates the permissibility of regulating speech-related conduct to serve legitimate goals unrelated to the suppression of ideas.

power.[105] The Court stressed that newspapers may be taxed for other, legitimate purposes whose achievement does not depend on suppression of speech, even though such a tax would reduce the money available for publishing. In fact, a year later, the Court dismissed an appeal from a decision upholding the application to newspapers of a nondiscriminatory privilege tax. *Giragi* v. *Moore*, 301 U.S. 670 (1937). Similarly, the wages, prices, trade practices, and supplies of the press may be regulated in an evenhanded manner for purposes unrelated to speech, even though this may also reduce the resources available for publishing. *Associated Press* v. *United States*, 326 U.S. 1 (1945). In the same way, campaign giving and spending limits may be imposed to serve purposes that are not achieved through suppression of speech, even if they incidentally impinge on campaign expression.

Moreover, decisions such as *Mills*, *Grosjean*, and *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), reflect in part the special role of the press in our system of freedom of expression. The critical importance of a free press in our history requires that the most extreme necessity be shown to justify any direct restriction on its freedom to publish. *E.g.*, *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964); "Or of the Press," Address of Justice Potter Stewart, Yale Law School Sesquicentennial Convocation (Nov. 2, 1974). *Compare New York Times Co.* v. *United States*, 403 U.S. 713 (1971), *with Gravel* v. *United States*, 408 U.S. 606 (1972). The decisions placing some limits on the rights of reporters to gather news, *Pell* v. *Procunier*, 417 U.S. 817 (1974); *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), do not erode that principle. In light of the special role

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[105] Alfange, *Free Speech and Symbolic Conduct: The Draft-Card Burning Case*, 1968 Sup. Ct. Rev. 1, 33-34.

of the press, laws regulating campaign practices must scrupulously respect its editorial freedom—as these laws clearly do. T. Emerson, *supra* note 31, at 631-40, 667-71; *see* pp. 158-60, *infra*.

Moreover, the spending of large amounts of money is conduct, not speech. This Court has repeatedly held that nonspeech conduct is not entitled to the same protection as speech, even when engaged in for purposes of expression. For example, in *Cox* v. *Louisiana*, 379 U.S. 559, 564 (1965), it upheld a statute banning demonstrations in or near a courthouse:

> ". . . We are not concerned here with such a pure form of expression as newspaper comment or a telegram by a citizen to a public official. We deal in this case not with free speech alone, but with expression mixed with particular conduct . . . .
>
> "We hold that this statute on its face is a valid law dealing with conduct subject to regulation so as to vindicate important interests of society and that the fact that free speech is intermingled with such conduct does not bring it constitutional protection."

The Court in *Cox* held that the statute was justified by the state's interest in preventing its courts from being subjected to improper influences—an interest similar to that served by these statutes:

> "It is, of course, true that most judges will be influenced only by what they see and hear in court. However, judges are human; and the legislature has the right to recognize the danger that some judges, jurors, and other court officials, will be consciously or unconsciously influenced by demonstrations in or

> near their courtrooms both prior to and at the time of the trial. A State may also protect the judicial process from being misjudged in the minds of the public. . . ." *Id.* at 565.

These considerations were held to justify "a legislative determination based on experience that such conduct inherently threatens the judicial process." *Id. See also Cameron* v. *Johnson*, 390 U.S. 611 (1968). Surely Congress in this case had no less power to remove the danger that elected officials "will be consciously or unconsciously influenced" by massive campaign contributions, and to "protect the [political] process from being misjudged in the minds of the public." [106]

Conduct that merely amplifies the effects of speech can also be regulated to serve a non-censorial purpose. In *Kovacs* v. *Cooper*, 336 U.S. 77 (1949), the Court upheld a city ordinance forbidding the use of loudspeakers emitting "loud and raucous noises" on the public streets. It affirmed the conviction of a person who had used a sound truck to publicize his views on a pending labor dispute, holding that his First Amendment right to speak

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[106] *See also Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490 (1949); *Zemel* v. *Rusk*, 381 U.S. 1, 16-17 (1965); *Broadrick* v. *Oklahoma*, 413 U.S. 601, 614 (1973).

Mr. Justice Black, who believed that the First Amendment's protection of *speech* is absolute, nonetheless consistently recognized that conduct merely related to speech is entitled to a lesser degree of protection. *E.g., Giboney* v. *Empire Storage & Ice Co., supra; Street* v. *New York*, 394 U.S. 576, 609-10 (1969) (dissenting opinion); *Tinker* v. *Des Moines School Dist.*, 393 U.S. 503, 515 (1969) (dissenting opinion).

Mr. Justice Douglas has expressed the same view. *E.g., Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1, 173-74 (1961); *Teamsters Local 695* v. *Vogt, Inc.*, 354 U.S. 284, 295 (1957) (dissenting opinions). *See also United States* v. *CIO*, 335 U.S. 106, 139-40 (1948) (Rutledge, Black, Douglas, Murphy, J.J., concurring).

did not prevent reasonable regulation of place, time, and volume. Mr. Justice Frankfurter, concurring, explained:

> "Only a disregard of vital differences between natural speech, even of the loudest spellbinders, and the noise of sound trucks would give sound trucks the constitutional rights accorded to the unaided human voice. Nor is it for this Court to devise the terms on which sound trucks should be allowed to operate, if at all. These are matters for the legislative judgment controlled by public opinion. So long as a legislature does not prescribe what ideas may be noisily expressed and what may not be, nor discriminate among those who would make inroads upon the public peace, it is not for us to supervise the limits the legislature may impose in safeguarding the steadily narrowing opportunity for serenity and reflection. Without such opportunities freedom of thought becomes a mocking phrase, and without freedom of thought there can be no free society." *Id.* at 96-97.

The public interests here are different from those in *Kovacs*—not protection against noise, but against the corrosive effects of money. Much more clearly than in *Kovacs*, these laws can achieve their goals regardless of their effect—or lack of effect—on the volume or reach of speech itself. Campaign money may, of course, be used as a means of amplifying the reach of "the unaided human voice." But reasonable and evenhanded limits on giving and spending serve purposes unrelated to money's usefulness in this respect. They suppress no one's ideas or speech. Any incidental effect in reducing the amplification of expression by the wealthy does not offend the First Amendment. As Professor Freund has said:

> "The right to speak is, I submit, more central to the values envisaged by the First Amendment than the right to spend. We are dealing here not so much with the right of personal expression or even association, but with dollars and decibels. And just as the volume of sound may be limited by law, so the volume of dollars may be limited, without violating the First Amendment." [107]

Professors Alexander Bickel and Abraham Rosenthal have expressed the identical view.[108]

Moreover, appellants are wrong in contending that reasonable giving and spending limits will necessarily lower the overall "level of political communication." Appellants' Br. 48. Appellants' stress on the amounts given or spent in the past misses the point—because it assumes that what has been, must and should be. If large contributions and expenditures have played a big role in some recent campaigns, it does not follow that future campaigns will be unable to adapt to these laws and to accomplish ample "political communication" through different means. Indeed, such adaptation is a goal of these laws.

Despite appellants' protests to the contrary, money is not all there is to campaigning. The stump has not wholly been replaced by the cash register. Citizens can—and do—participate in politics in myriad ways that do not involve giving or spending large sums of campaign money. Findings I, ¶ 5, IIA J.A. 6-8. Citizen activities that can affect the political process include joining or forming an organization dedicated to one's goals; organizing and attending rallies; distributing handbills; lobby-

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[107] Freund, *supra* note 31, at 72-73.

[108] *See* Bickel, *supra* note 31, at 65 ("I agree that regulating the giving of money is not the same as regulating speech"); A. Rosenthal, *supra* note 31, at 21 ("Spending money is not the same as speech-making, even if the former may foster the latter").

ing for or against legislation; writing letters to office-holders or newspaper editors; drafting and circulating petitions; making speeches; and contributing personal services to candidates for office. Such personal services can often replace services for which candidates would otherwise have to pay.[109] The vast majority of citizens who participate in these activities do so without spending significant amounts.[110]

To the extent that giving and spending limits restrict some avenues of political activity, the result is most likely to be an increase in these and other activities, rather than the silencing of any expression. The district court has found that:

> "Difficulty in engaging in one kind of activity [affecting the political process] may induce an individual to engage instead in a different activity." Findings I, ¶ 5, IIA J.A. 7-8.

This Court has stressed that the availability of multiple, unrestricted avenues of expression is significant in de-

[109] Even appellants' affiant Cole concluded that only about 40 percent of all campaign money has been spent for purposes directly related to expression. R. Cole, Campaign Spending in Senate Elections 30, 100-01 (1975). The remainder goes to pay staff salaries, travel expenses, the gathering of intelligence, or even, as the Watergate experience indicated, "dirty tricks" (Findings I, ¶ 128, IIA J.A. 156)—activities only indirectly related to the writing or dissemination of political speech. Appellants have not shown that any reduction in campaign spending will necessarily come out of speech-related expenses.

[110] Appellants claim that "campaign contributions tend to be less concentrated in a small percentage of the population than other forms of political activity." Appellants' Br. 62. But the facts show that 14 percent of the population have worked actively for a candidate (Findings I, ¶ 107, IIA J.A. 97), compared to the mere one percent of the people who contribute 90 percent of the money all candidates receive for their campaigns, Findings I, ¶ 100, IIA J.A. 54.

termining the permissibility of regulations that incidentally impinge on one mode of expression:

> "That more people may be more easily and cheaply reached by sound trucks . . . is not enough to call forth constitutional protection . . . when easy means of publicity are open. . . . [The challenged loudspeaker law places] no restriction upon the communication of ideas or discussion of issues by the human voice, by newspapers, by pamphlets, by dodgers." *Kovacs* v. *Cooper*, 336 U.S. 77, 88-89 (1949).[111]

Moreover, since giving and spending limits apply only to candidate-related activities, an individual can give or spend as much money as he likes to promote issues and to help issue-oriented groups to achieve goals other than the immediate election of candidates. These laws impose no limits whatsoever on giving or spending to promote ideas or causes, only on giving or spending to promote personal candidacies for office. They make the same distinction between partisan campaigning and other political activity as do the Hatch Act restrictions upheld in *United Public Workers* v. *Mitchell*, 330 U.S. 75, 99-100 (1947), and *Civil Service Commission* v. *Letter Carriers*, 413 U.S. 548, 556 (1973).

Appellants' brief itself highlights the significance of noncandidate political activities. Appellants recall successful political movements—some of which have changed history—that relied to some extent on large contributions. Appellants' Br. 122-23. But the movements they cite accomplished their ends largely *outside the electoral*

[111] *Accord, Pell* v. *Procunier*, 417 U.S. 817, 823-24 (1974); *Breard* v. *Alexandria*, 341 U.S. 622, 644-65 (1951); *United Public Workers* v. *Mitchell*, 330 U.S. 75, 99-100 (1947).

process. They illustrate the many political activities not reached by the limits of which appellants complain.[112] Appellant Mott, and others with strong political views—both wealthy and poor—may undertake an endless range of "activities [that] further the political goals and purposes of the individuals involved, as do campaign contributions." *Id.* at 125.

Appellants' concessions demonstrate how limited is the impact of campaign giving and spending limits on the "level of political communication." Such limits do not stifle political activity. They merely prevent—at the source—the abuses that flow from candidates' dependence on large private contributions. If set at reasonable levels, monetary limits will not prevent candidates from getting their messages fully to the electorate—particularly in view of the public financing provided for presidential campaigns and under consideration for congressional campaigns.[113] *A fortiori*, they will not inhibit the myriad political activities that do not involve giving large sums of money to candidates for federal office. As

[112] Appellants acknowledge that there are "at least thirty ways of participating in the political process, . . . *only three of which . . . are regulated by the challenged statutes, even though many others are of comparable or greater effectiveness* than campaign contributions and involve the use of money for political purposes." *Id.* at 125 (emphasis added).

[113] Congress is now considering bills to provide public financing for congressional campaigns. H.R. 9100; S. 564. Last year, the Senate passed a congressional public financing bill. 120 Cong. Rec. 55852 (daily ed. Apr. 11, 1974). This year, in the House, the bill already is co-sponsored by 221 Congressmen, more than a majority of the House membership. 121 Cong. Rec. H8048 (daily ed. July 31, 1975).

appellants admit, "None of these are touched by the statutes." Appellants' Br. 125.

Even if we were wrong, and the limits did depend for their effectiveness on limiting the quantity of campaign speech, the limits would be sustainable. Equal limits in a debating context are common in our free and open society and have never been thought to impose unconstitutional limits on speech—even political speech. Court rules fixing equal page limits for briefs and equal time limits for oral argument have never been thought to infringe the First Amendment. In any structured debate, rules fixing equal time are accepted as necessary methods of achieving focus and good order. Like the restrictions on the time, place, and manner of speech repeatedly upheld by this Court,[114] they are entirely neutral as between speakers and points of view. When the debate is conducted under governmental auspices, as in a judicial proceeding or an election for public office, reasonable and evenhanded rules that fix equal limits do not automatically transgress the First Amendment.

C. Reasonable Giving and Spending Limits Are Not Unnecessarily Restrictive Means To Accomplish Congress' Goals

Although giving and spending limits touch incidentally on First Amendment activities, they do so no more than reasonably necessary to preserve the integrity of the electoral process.[115] This Court has recently reaffirmed that

[114] *E.g.*, *Grayned* v. *Rockford*, 408 U.S. 104 (1972); *Cameron* v. *Johonson*, 370 U.S. 611 (1968); *Adderly* v. *Florida*, 385 U.S. 39 (1966); *Cox* v. *Louisiana*, 379 U.S. 559 (1965).

[115] As noted, we deal in Part V with appellants' complaints about the particular monetary limits contained in these laws and show that appellants have failed to prove any palpable restrictions on their political activity.

laws in this area must take the least restrictive course that will achieve Congress' goals. In *American Party* v. *White*, 415 U.S. 767, 781 (1974), a nearly unanimous Court held that electoral regulations are "constitutionally valid measures" if "reasonably taken in pursuit of vital state objectives that cannot be served equally well in significantly less burdensome ways." Where a variety of equally effective means are available to achieve compelling public interests, Congress may not choose those which are significantly more intrusive on First Amendment interests. *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960); *see* Note, *Less Drastic Means and the First Amendment*, 78 Yale L.J. 464 (1969). However, the fact that less intrusive measures can be imagined does not warrant a finding of unconstitutionality unless it is clear that those measures can accomplish the congressional goals with equal effectiveness. "The Constitution does not require the state to choose ineffectual means to achieve its aims." *Storer* v. *Brown*, 415 U.S. 724, 736 (1974); *id.* at 761 (Brennan, J., dissenting); *Rosario* v. *Rockefeller*, 410 U.S. 752, 762 n.10 (1973).

It need not be demonstrated that every conceivable application of the statute is necessary to further the statutory objectives. *Procunier* v. *Martinez*, 416 U.S. 396, 414 (1974); *United Public Workers* v. *Mitchell*, 330 U.S. 75, 100-01 (1947). This Court upheld the prohibition on courthouse picketing in *Cox* v. *Louisiana*, 379 U.S. 559 (1965), to protect the integrity of the judiciary, even though that law might apply in individual instances where such picketing would in fact have no coercive effect. A statute is not unnecessarily restrictive merely because it may affect certain innocent transactions—as

long as the statute is "generally necessary" to achieve the Government's vital ends. *Procunier* v. *Martinez*, 416 U.S. at 414.

Congress determined after exhaustive inquiry that giving and spending limits, disclosure, public financing, and independent enforcement together are necessary to preserve the integrity of the electoral process because other measures cannot achieve that purpose with equal effectiveness. For half a century, Congress has experimented with various combinations of disclosure requirements,[116] contribution limits,[117] expenditure limits,[118] public financing,[119] bribery laws,[120] and improper influence laws,[121] but those laws did not solve the urgent problems presented by the abuse of money in electoral politics.

Appellants urge that the only means constitutionally available to Congress to regulate the use of money in elections are minimal disclosure requirements and a prohibition against bribery. Appellants' Br. 77. That suggestion mocks the gravity and complexity of the problems that confronted Congress. Disclosure and bribery laws

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[116] Federal Corrupt Practices Act of 1910, 36 Stat. 822, as amended, 37 Stat. 25 (1911); Federal Corrupt Practices Act of 1925, 43 Stat. 1070, 2 U.S.C. §§ 241-256 (repealed); Federal Election Campaign Act of 1971, 86 Stat. 11, 2 U.S.C. §§ 431-454.

[117] Hatch Act of 1940, § 20, 54 Stat. 767.

[118] *Id.* § 13; Federal Election Campaign Act of 1971, Pub.L. 92-225, 86 Stat. 3, § 104(b)(c), repealed by Pub.L. 93-443, 88 Stat. 1278, § 205(b).

[119] Presidential Election Campaign Fund Act of 1966, 80 Stat. 1587, suspended, 81 Stat. 57 (1967).

[120] 18 U.S.C. § 201.

[121] *E.g.*, 18 U.S.C. §§ 599, 600.

have been on the books for fifty years, but have utterly failed to eradicate corruption, improper influence, or the appearance of both. The disclosure provisions in these laws took effect on April 7, 1972, but did not prevent the large contributions made since then or the excessive and admittedly unnecessary spending that occurred in the 1972 presidential election. *See* Findings I, ¶ 147, IIA J.A. 203; *id.* IIA, ¶¶ 78, 115 (recomputed ¶ 53), IIB J.A. 459, 475. Unless all candidates are freed of their dependence on large contributions, voters "do not have a choice between clean money candidates and dirty money candidates; all are soiled." [122] Disclosure and bribery laws alone do not serve the other goals of these statutes at all.

Neither could contribution limits alone accomplish the legislative goals. The court of appeals found, and the record amply shows, that the thirst for campaign money would produce "almost insuperable . . . problems" in enforcing contribution limits if spending were not also limited. Ct. App. Op. 1541; *see id.* at 1516, 1537-38. Spending limits are required also to lower the barrier to entry by new candidates which unlimited spending creates. *Id.* at 1539.

The conclusion that lesser means had not sufficed was amply justified by the historical record before Congress. Appellants have produced nothing that would justify this Court's substituting a different reading of history. This is not a case in which the Court can identify alternative measures plainly equivalent in effectiveness. *E.g.*, *Martin* v. *City of Struthers*, 319 U.S. 141 (1943). As the court of appeals correctly concluded:

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[122] D. Adamany & G. Agree, *supra* note 48, at 114.

> "We see no principled basis on which a court can displace the legislative judgment that reporting and disclosure are necessary, but not sufficient, remedies to achieve the objective of trammeling 'the pernicious influence of "big money" campaign contributions.'" Ct. App. Op. 1518-19, *quoting United States* v. *UAW*, 352 U.S. 567, 572 (1972) (footnotes omitted).

This Court has reached the same conclusion in decisions upholding laws *more* restrictive than these, to serve interests certainly no more compelling.

1. *This Court Has Upheld More Restrictive Limitations on Direct Political Activities*

The Court has upheld laws that restrict not mere political spending but direct political participation itself. In *Civil Service Commission* v. *Letter Carriers*, 413 U.S. 548 (1973), it upheld the Hatch Act provision forbidding federal employees from taking "an active part in political management or in political campaigns." Hatch Act § 9(a), 5 U.S.C. § 7324(a)(2). On the same day, it held that states may also restrict partisan activity by their employees—as all 50 states have done. *Broadrick* v. *Oklahoma*, 413 U.S. 601, 604-05 n.2 (1973).

Restrictions on partisan activities by public employees serve two purposes, similar to the purposes of the laws challenged here: They protect (1) the public's right to have its civil servants "enforce the law and execute the programs of the Government without bias or favoritism for or against any political party or group or the members thereof," 413 U.S. at 565, and (2) the employees' right not to be pressured by their superiors to engage in partisan politics.

This Court affirmed the appropriateness of these governmental objectives in *United Public Workers* v. *Mit-*

chell, 330 U.S. 75 (1947). In *Letter Carriers* and *Broadrick*, it "unhesitatingly reaffirm[ed]" that even the Hatch Act's broad prohibition of any partisan campaign activity by public employees is permissible to accomplish these important objectives, 413 U.S. at 556. It rejected precisely the overbreadth attack made by appellants here: that Congress could only prohibit corruption itself, not take broader prophylactic measures. The Court said:

> "[T]he joint judgment of the Executive and Congress has been that to protect the rights of federal employees with respect to their jobs and their political acts and beliefs it is not enough merely to forbid one employee to attempt to influence or coerce another. . . . Perhaps Congress at some time will come to a different view of the realities of political life and Government service; but that is its current view of the matter, and we are not now in any position to dispute it. Nor, in our view, does the Constitution forbid it." *Id.* at 566-67.[123]

The Court in *Letter Carriers* also recognized that, in order to avoid the *appearance* of corruption or bias, it may be necessary for Congress to act more broadly than merely to prohibit the undesired practices.

> "[I]t is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical *that they appear to the public to be avoiding it*, if confidence in the system

[123] As the dissenters in *Broadrick* noted, the appellants there conceded "that the State could prohibit the conduct with which they were charged [partisan campaigning for a local official] without infringing the guarantees of the First Amendment"; the dissenters found the statute to be insufficiently precise in accomplishing that goal. 413 U.S. at 621-22, 628-29 (Brennan, J., joined by Stewart & Marshall, J.J.); *see id.* at 597 (Douglas, J.). By contrast, these laws set precise dollar limits and provide for clarification of any ambiguities by the FEC.

> of representative Government is not to be eroded to a disastrous extent." *Id.* at 565.

Of course, the Hatch Act restrictions on direct political activities would be unconstitutionally broad if applied to the whole electorate. But *Letter Carriers* provides strong support for the proposition that where lesser measures have failed, Congress has latitude to impose stronger ones in order to meet compelling needs. The monetary limits challenged here are far less restrictive than the Hatch Act strictures, and there has been no demonstration that they go further than necessary to meet related and equally compelling needs.

2. *The Courts Have Upheld More Restrictive Limitations on Political Giving and Spending*

The courts have also upheld regulations of political giving and spending that are more restrictive than the limits in these laws. Federal law for many years has prohibited corporations (since 1907) and unions (since 1943) from making *any* contributions to federal electoral campaigns. 18 U.S.C. § 610; Note, *Statutory Regulation of Political Campaign Funds*, 66 Harv. L. Rev. 1259 (1953). Since 1947, that law has also forbidden corporate or union *expenditures* aimed at influencing voters at large. A corporation or union may spend only to express its views to its stockholders or members or to encourage them to make voluntary contributions to a separate segregated fund managed by the corporation or union for political purposes.[124]

[124] 18 U.S.C. § 610. The Government's *Amicus* Brief (at 35-36, 74) seriously misreads these laws to allow such separate funds to make campaign contributions and expenditures *without limit* from the money voluntarily donated by stockholders or members. In fact, the funds are political committees subject to the same contribution limits as other committees and to the $1,000 "independent expendi-

The prohibitions in Section 610 serve two purposes: to prevent undue exertion of the political power that corporations and unions possess because of their aggregated wealth, and to protect minority stockholders or members who do not wish to contribute to causes of the organization's choosing. The first of these purposes is closely related to the goals of the laws challenged here.

This Court has never been required to rule on the constitutionality of Section 610 or its predecessors. However, it has dealt with the statute on several occasions and has recognized the legitimacy of its legislative purposes. *See Cort* v. *Ash*, 43 U.S.L.W. 4773 (1975); *Pipefitters Union* v. *United States*, 407 U.S. 385, 402, 413-17 (1972); *United States* v. *UAW*, 352 U.S. 567, 593 (1957); *United States* v. *CIO*, 335 U.S. 106, 113-15 (1948).[125] In *UAW*, Mr. Justice Douglas, dissenting from the majority decision not to pass on the statute's constitutionality as applied to a union-financed radio broadcast, expressed the view of three Justices that, "If Congress is of the opinion that large contributions by

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ture" limit of Section 608(e). The exceptions in Sections 610 and 608(e)(2)(B), to which the Government's *Amicus* Brief refers, merely codify this Court's ruling in *United States* v. *CIO*, 335 U.S. 106 (1948), that organizations subject to Section 610 may spend to communicate with their members and to solicit contributions from them to a voluntary fund.

[125] The *CIO* decision construed Section 610 to allow corporations and unions to spend to communicate with their stockholders or members about federal candidates. Four Justices, concurring, thought the statute forbade such communications and that it was unconstitutional *in that respect only*. However, they added:

> *"Other applications are not in question. There can be little doubt of Congress' power to regulate the making of political contributions and expenditures* by labor unions, as well as by other organizations *and individuals*, in the interest of free and pure elections and the prevention of official corruption, by appropriate measures not trenching on those basic rights." 335 U.S. at 139 (emphasis added).

labor unions to candidates for office and to political parties have had an undue influence upon the conduct of elections, *it can prohibit such contributions.*" *Id.* at 598 n. 2 (emphasis added).[126]

The District of Columbia Circuit and the Eighth Circuit have both upheld Section 610. *United States* v. *Boyle*, 482 F.2d 755, *cert. denied*, 414 U.S. 1076 (1973); *United States* v. *Pipefitters Local 562*, 434 F.2d 1116 (8th Cir. 1970), *rev'd on other grounds*, 407 U.S. 385 (1972). *Accord*, *United States* v. *Painters Union*, 79 F. Supp. 516 (D. Conn. 1948), *rev'd on other grounds*, 172 F.2d 854 (2d Cir. 1949); *United States* v. *United States Brewers' Ass'n*, 239 Fed. 163 (W.D. Pa. 1916). The Eighth Circuit has also upheld the Public Utility Holding Company Act's ban on political contributions by registered public utility holding companies. *Egan* v. *United States*, 137 F.2d 369 (8th Cir. 1943), *cert. denied*, 320 U.S. 788 (1943). Appellants do not challenge the constitutionality of those laws.

Bans on political contributions by federal employees to other federal employees have long been recognized as constitutional. Congress in 1876 prohibited federal employees from giving money to or receiving it from other federal employees for political purposes. This Court upheld the law as a proper measure "to promote efficiency and integrity in the discharge of official duties." *Ex parte Curtis*, 106 U.S. 371, 373 (1882). The Court also upheld Section 312 of the Federal Corrupt Practices Act, which prohibited any member of Congress, any candidate for Congress, or any federal employee from giving to, or

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[126] Obviously, appellants are wrong in saying that in *UAW* "Mr. Justice Douglas would have found 18 U.S.C. § 610 (prohibiting corporate and labor-union contributions) unconstitutional." Appellants' Br. 46 n.5.

receiving from, any other such person any contribution for a political purpose. *United States* v. *Wurzbach*, 280 U.S. 396 (1930). The Court there sustained the indictment of a Congressman for receiving campaign contributions from other federal employees, saying:

> "It hardly needs argument to show that Congress may provide that its officers and employees neither shall exercise nor be subjected to pressure for money for political purposes, upon or by others of their kind, while they retain their office or employment." *Id.* at 398-99.

Successors to those statutes are found in 18 U.S.C. §§ 602 and 607, punishing both the giving and receiving of contributions among federal employees. Appellants do not challenge their constitutionality.

Unlike those *total prohibitions* on political activities, contributions, or expenditures, the giving and spending limits in the challenged statutes leave every person free to contribute or spend, where otherwise legal, up to the monetary limits in 18 U.S.C. § 608. They leave to each donor or spender an equal opportunity to participate in elections through the expenditure of money. And they leave all candidates an equal right to use money to enhance the impact of their political messages. They are clearly less restrictive than the total prohibitions previously approved by the courts.

Even the concurring Justices in *United States* v. *CIO*, *supra*, who would have struck down the *total* prohibition on corporate and union spending insofar as it prevented such entities from expressing their views to their members, said that a reasonable monetary limitation would be less objectionable under the First Amendment. 335 U.S.

at 145-46.[127] Congress exercised sound judgment in concluding that the evils of financial excesses in campaigning necessitated imposition of reasonable monetary limitations applicable to all contributors and candidates.[128]

V. APPELLANTS HAVE FAILED TO PROVE THAT THE PARTICULAR CONTRIBUTION AND EXPENDITURE LIMITS IN THESE STATUTES UNCONSTITUTIONALLY RESTRICT THEIR FIRST OR FIFTH AMENDMENTS RIGHTS

A. Appellants Have Failed To Prove That the Particular Contribution Limits Chosen by Congress Are Unreasonable or Discriminatory

In addition to attacking *any* limits on contributions, appellants also urge that the particular contribution limits Congress established violate the Constitution because they discriminate against challengers to incumbents—and

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[127] The inference drawn from their opinion by the Government's *Amicus* Brief (at 34-35 n. 16), that giving and spending limits impermissibly prevent the expression of "bloc sentiment," is therefore wrong. Reasonable monetary limits prevent no group from expressing its views, as the four concurring Justices recognized.

[128] Appellants cite two recent state court decisions voiding laws that set spending limits. Appellants' Br. 85-86. In both cases the candidate spending limits were intertwined with other provisions not contained in these laws that impermissibly subjected both candidate and non-candidate expenditures to the same ceiling. The Oregon statute invalidated in *Deras* v. *Myers*, —— Ore. ——, 535 P. 2d 541 (1975), prohibited any expenditure in support of or opposition to a candidate without the candidate's permission. Under the Washington statute, *Bare* v. *Gorton*, 84 Wash. 2d 380, 526 P.2d 379 (1974), a wealthy person or group acting without the candidate's consent could have spent the entire statutory maximum, thereby precluding expenditures by the candidate himself. Both statutes thus resembled former Title I of the FECA, held invalid in *ACLU, Inc.* v. *Jennings*, 366 F. Supp. 1041 (D.D.C. 1973), *vacated as moot*, 43 U.S.L.W. 3673 (1975). As we show below (pp. 158-60), Congress carefully drafted these laws with the *Jennings* problem in mind.

minor party and independent candidates—by denying them the large gifts allegedly needed to wage "effective" campaigns and to obtain the "seed money" allegedly needed to support a "viable" campaign.

1. *Appellants Have Failed To Prove That the Contribution Limits Prevent Any Class of Candidates from Conducting "Effective" Campaigns*

Appellants assert that incumbency benefits a candidate and that major party candidates have advantages over minor party and independent candidates. They suggest that one means by which the disadvantaged can overcome their handicaps is to outspend their opponents; but they complain that such outspending is impossible if the size of contributions is limited and if ceilings on total expenditures are established.[129] Such assertions are mistaken in fact and are beside the point.

Of course incumbents have inherent advantages over challengers that derive from the holding of office. They may also have disadvantages that derive from voter perception of their conduct in office.[130] In any event, these advantages and disadvantages are not created or increased by the challenged contribution limits. Where incumbents use their offices for partisan purposes, that practice itself can be remedied.

Appellants appear to believe that incumbents exploit the perquisites of federal elective office to give themselves a financial advantage over challengers, and that challengers must be allowed to raise more large contribu-

[129] We deal here with the alleged discriminatory effects of the contribution limits. In Part V-B, *infra*, we deal with the ceilings on candidate expenditures, and in V-C with the ceilings on "independent" expenditures.

[130] *See* D. Dunn, *supra* note 34, at 7-8.

tions to overcome this fact. If incumbents do make improper partisan use of the perquisites of their offices, remedies are available to prevent that practice. For example, a suit is currently in progress challenging the alleged political abuse of the frank. *Common Cause* v. *Klassen*, C.A. No. 1887-73 (D.D.C.). The proper legislative or judicial remedy for any such abuse is not to invalidate these neutral campaign reform measures, but to attack the abuses directly.

Appellants' attack fails to recognize that the need for money in politics is relative and that the contribution limits will apply equally to incumbents and challengers, major parties and minor parties, alike. The FECA Amendments permit individuals to contribute $1,000 per candidate per election (and not more than $25,000 to all candidates per year). Certain organizations are permitted to contribute $5,000 per candidate per election. These limits are evenhanded and neutral on their face. They apply regardless of the identity or views of the donor or the recipient. The lines drawn by Congress

> "are not aimed at particular parties, groups, or points of view, but apply equally to all. They discriminate against no racial, ethnic, or religious minorities. Nor do they seek to control political opinions or beliefs, or to interfere with or influence anyone's vote at the polls." *Civil Service Commission* v. *Letter Carriers*, 413 U.S. 548, 564 (1973).

The constitutionality of a statute so neutral on its face does not become doubtful because it may adversely affect some proportion of challengers or minor party and independent candidates in a random fashion, just as it may adversely affect some proportion of incumbents and major party candidates. A showing that the law will sometimes operate in favor of one faction and sometimes

in favor of another is insufficient proof that constitutional guarantees have been violated. *See Hunter* v. *Erickson*, 393 U.S. 385, 394 (1969) (Harlan, J., concurring). Rather, it is necessary to show that the statute necessarily disadvantages challengers or minor party candidates and favors incumbents or major party candidates as a class. *See Gordon* v. *Lance*, 403 U.S. 1, 7 (1971); *Jefferson* v. *Hackney*, 406 U.S. 535, 548-49 (1972); *cf. James* v. *Valtierra*, 402 U.S. 137, 141-43 (1971). The record before this Court shows no such disadvantaged class.

Appellants carry the burden as plaintiffs of proving that the contribution limits have a "real-life impact" of discriminating against challengers or minor party and independent candidates as discrete classes of candidates. *Cf. Whitcomb* v. *Chavis*, 403 U.S. 124, 146 (1971). Their statistical demonstrations fall far short of meeting that burden. As the court of appeals concluded:

> "We have considered the charge that the limits set by Congress work an undue discrimination in favor of incumbents. Although plaintiffs sought findings in support of this theory, Judge Corcoran properly declined to provide such findings in light of the speculative nature of the assertions. The material available to the court looks both ways. The political scientists draw diametric conclusions from the available information." Ct. App. Op. 1540-41 (footnote omitted).

The record is at worst indecisive. It permits only the conclusion that the impact of contribution limits on elections varies in each case, along with the innumerable other interacting variables of the political vortex. Indeed, the record evidence refutes appellants' claim that the contribution limits necessarily discriminate against

a class comprised of all or even most challengers, or against a class of all or even most minor party and independent candidates.

The best available data of record, taken from the contribution and expenditure records of all 1972 and 1974 federal elections, [131] show that there is no basis for the assertion that contribution limits will reduce the relative ability of challengers or minor party and independent candidates to raise campaign money, as compared to their opponents. Most incumbents and major party candidates have always outstripped their opponents in the ability to raise and spend campaign funds, particularly in the ability to raise large contributions. This is one advantage of incumbency that appellants studiously ignore. The contribution limits on the whole bite deeper into the traditional sources of financial support for incumbents and major parties than any other putative class.[132]

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[131] The data are found in Part IIA of the district court's findings (cited as "Findings IIA") and are derived from computer studies by the Common Cause Campaign Finance Monitoring Project based on official reports. The court of appeals relied properly on these findings exclusively in discussing the 1972 and 1974 elections. Ct. App. Op. 1540, n. 105.

Appellants also make use of these findings, but in certain instances they use figures drawn from a study by one of their affiants, Roland J. Cole. Appellants cite the Cole materials as "Findings II, B—, p. ——, App. ——." Appendix A to this brief describes the Common Cause and Cole studies and explains why this Court should, like the court of appeals, avoid reliance on the Cole materials.

[132] If the $1,000 individual contribution limit had been in effect for the 1974 congressional elections, incumbents would have given up 1½ times as much as challengers. Findings IIA, ¶ 115 (¶ 55 recomputed), IIB J.A. 475. If the $5,000 limit on political committees had been in effect for the 1974 elections, incumbents would have given up three times as much as challengers. Findings IIA, ¶ 80, IIB J.A. 459.

Available 1972 and 1974 figures show that challengers and minor party and independent candidates on the whole *would have been in approximately the same or a better position* relative to incumbents and major party candidates *if the contribution limits had been in effect.* The following table indicates the amounts raised by major party challengers as a percent of the amounts raised by major party incumbents in the 1972 presidential and 1974 congressional elections (1) if all contributions, however large, are considered, and (2) if only the first $1,000 of any contribution from an individual is considered: [133]

TABLE 1

Amount Raised by Challengers As a Percent of Amount Raised by Incumbents

	(1) With No Contribution Limit	(2) Assuming $1,000 Contribution Limit
1972 Presidential Race	64.3%	94.0%
1974 Congressional Races	56.1%	55.3%

Thus, the imposition of a $1,000 limit on individual contributions would have substantially *strengthened* the rela-

[133] Based on Findings IIA, ¶¶ 74, 115 (recomputed ¶¶ 57-58), IIB J.A. 458, 476. Similar results obtain if the excess of organizational contributions over $5,000 is subtracted. Findings IIA, ¶¶ 77-90, IIB J.A. 459-61.

The Common Cause studies on which these figures are based do not permit similar comparisons to be made for the 1972 congressional elections.

We recognize, of course, that if contributions by individuals over $1,000 had in fact been barred in 1972 and 1974, the results might have differed somewhat from the actual amounts raised less the excesses over $1,000 since the fund-raising methods of candidates would have differed. But any differences are purely speculative. The 1972 and 1974 facts of record provide the best available evidence of what would have happened in 1972 and 1974 under the contribution limits of the challenged legislation and what is likely to happen in 1976.

tive financial position of the *challenger* in the 1972 presidential race,[134] and would have had no material effect on the relative financial strength of challengers in the 1974 congressional races.

The following table makes the same comparison for minor party and independent candidates vis-a-vis major party candidates: [135]

TABLE 2

Amount Raised by Minor Party and Independent Candidates as a Percent of Amount Raised by Major Party Candidates

	(1) With No Contribution Limit	(2) Assuming $1,000 Contribution Limit
1972 Presidential Race	1.05%	1.85%
1974 Congressional Races	1.73%	1.73%

Again, these data suggest no material effect on the relative financial position of minor party or independent candidates opposing major party candidates in the 1974 con-

[134] If a $1,000 individual contribution limit had been in effect in 1972, $33.1 million in contributions to President Nixon and $13.2 million in contributions to Senator McGovern would have been eliminated. Findings IIA, ¶ 73, IIB J.A. 457.

[135] Based on Findings IIA, ¶¶ 75, 115 (recomputed ¶¶ 59-60), IIB J.A. 458, 476-77. No organizational contributions over $5,000 went to minor party or independent candidates in the 1974 congressional races. Findings IIA, ¶ 80, IIB J.A. 459.

If a $1,000 individual contribution limit had been in effect in the 1972 presidential race, only $66,000 in contributions to minor party and independent candidates would have been eliminated—six percent of their total contributions. In contrast, $13.2 million—or 34 percent—of McGovern's contributions and $33.1 million—or 55 percent—of Nixon's contributions would have been eliminated by the limit. Findings IIA, ¶ 73, IIB J.A. 457. Thus, the facts clearly show that "patrons or large donors" do not "disproportionately support small or struggling parties." *Cf.* United States *Amicus* Br. 61.

gressional races, and a strengthening of minor party and independent candidates in the 1972 presidential race.

These past election statistics demonstrate that the challenged contribution limits are not likely to reduce—and may increase—the fund-raising ability of challengers and minor party and independent candidates, relative to incumbents and major party candidates. As the court of appeals concluded:

> "In a broad sense, the statute may favor relative newcomers, by limiting the access of incumbents to large donations." Ct. App. Op. 1541.

These are, of course, cumulative figures for the universe of incumbents and various classes of challengers. Within that universe, there were inevitable exceptions. But when a statute is attacked as unconstitutional on its face, the plaintiffs must demonstrate an intentionally or necessarily discriminatory effect on definable classes of affected persons:

> "In reversing the District Court we should emphasize that the equal-protection claim below was based upon an alleged *infirmity that attaches to the statute on its face* . . . . It might well be that, designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would *operate to minimize or cancel out the voting strength of racial or political elements of the voting population.* When this is demonstrated it will be time enough to consider whether the system still passes constitutional muster. This question, however, is not presented by the record before us." *Fortson* v. *Dorsey*, 379 U.S. 433, 438-39 (1965).

Appellants argue that the impact of the challenged contribution limits is most pronounced in "closely contested" campaigns—according to appellants' definition, those in which challengers received at least 45 percent of the vote. Appellants' Br. 129. Appellants have yet to demonstrate the truth or relevance of this suggestion. But accepting *arguendo* appellants' premise, the facts suggest that even when attention is narrowed to the races appellants define as "close," the challenged contribution limits may actually improve the financial position of challengers relative to incumbents. In the six 1974 Senate elections defined by appellants as "close," incumbents raised $225,948 in amounts over the new contribution limits, while challengers raised only $95,395 over those limits. Findings IIC, ¶ 8, IIB J.A. 676-78. In the 81 House races in 1974 defined by appellants as "close," only 3.5 percent of the total contributions received by challengers would have been eliminated if a $1,000 individual contribution limit had been in effect. *See* Findings IIC, ¶¶ 1, 9, IIB J.A. 586, 679-96. In 71 of these 81 races, only five percent or less of the challengers' total contributions would have been eliminated; in 30 of these 71 races, no contributions at all would have been eliminated. *Id.*

Moreover, the contribution limits will have another salutary effect from the perspective of challengers—they will tend to decrease the significant advantage which incumbents enjoy in raising special interest group money. Findings IIA, ¶¶ 77-90, 93-98, 105, 110-11, IIB J.A. 459-61, 462-65, 467-68, 470-72. And a study performed by Congressman Anderson suggests that such contributions play a more critical role in close elections.[136] Thus, contrary to appellants' hypotheses, the net impact of the contribution limits may be to improve the relative posi-

[136] *Hearings on H.R. 7612 and S. 372 Before the Subcomm. on Elections, supra* note 75, at 203, 219.

tion of challengers and minor party or independent candidates in close elections as well.

2. *Appellants Have Failed To Prove That the Contribution Limits Prevent Any Class of Candidates From Obtaining "Seed Money"*

Even though the overall contribution figures for 1972 and 1974 indicate no discriminatory effect against any putative class, appellants argue that the contribution limits will nevertheless discriminate against challengers and minor party and independent candidates because those candidates have a special need for "seed money" to launch their candidacies and can obtain that money only from large contributions. Again, the theory is unproven. The evidence in this case demonstrates that any necessary "seed money" can be raised in contributions permitted by the challenged statutes.

Appellants attempt to prove their assertions concerning "seed money" by reference to the amounts of contributions received before October 1, 1974—which they label "seed money" for purposes of the 1974 House and Senate elections. Appellants' Br. 130-31. What appellants are treating as "seed money" is all monies raised prior to the last five weeks of an election. Since the term "seed money" is commonly understood to refer to funds raised by a candidate "at the outset of the campaign" (Ct. App. Op. 1532 n. 85; Appellants' Br. 130), the proffered data are utterly unrelated to their assertions.

Appellants simply assume the critical fact on which their "seed money" argument depends—that early or "seed money" can be raised only in the form of large contributions. Appellants cite Senator Buckley's 1970 race, Senator McCarthy's New Hampshire primary race,

and other examples to support their "seed money" contentions. Appellants' Br. 132-37. These examples have limited, if any, probative force. First, since large contributions were permitted during the cited races, the candidates' reliance on such contributions proves only that they raised money in what was for them the easiest way then permitted—going to a few big donors. It does not tell what these candidates would or could have done had contribution limits been in effect. Second, appellant Buckley admits that he made no effort to raise "seed money" in small amounts, and appellant McCarthy admits that he has no knowledge whether his campaign made any such effort. Buckley Deposition Tr. at 7-9; Findings III, McCarthy ¶¶ 4, 9, IIB J.A. 714, 715. Moreover, appellants have failed to show what percentage of the early money in these and other campaigns was in fact received in large contributions.[137] These circumstances reduce the statements of appellants Buckley and McCarthy to mere self-serving opinions which merit little attention.[138]

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[137] For example, the Treasurer of appellant ACU testified that in his experience large contributions usually are made late in a campaign, not at the beginning. Joy Deposition Tr. at 37, 39, 40.

[138] The district court certified Senators Buckley and McCarthy as expert witnesses despite the fact that they had not been offered or qualified as such. As appellants in this action, their potential bias is a factor in deciding what weight to accord their testimony. *Grain Dealers Mut. Ins. Co.* v. *Farmers Union Cooperative Elev. & Shipping Ass'n*, 377 F.2d 672, 679 (10th Cir. 1967). Moreover, neither Buckley nor McCarthy when questioned during his deposition could testify to his own past fund-raising practices in any detail whatsoever.

The court found these men to be experts because of their experience as campaigners and Members of Congress. According to that reasoning, all 535 Members of Congress are also experts on this subject. Since the FECA and FECA Amendments were passed by large majorities, the weight of "expert" opinion overwhelmingly contradicts appellants McCarthy and Buckley on the need for large contributions to begin a campaign.

In contrast to these speculative opinions stands formidable record evidence that candidates can and have raised substantial sums of "seed money" well in advance of an election under the FECA contribution limits or more stringent self-imposed restrictions. The large array of 1976 presidential hopefuls, many of whom are relatively unknown nationally, have raised substantial "seed money" from small contributions. The following table sets forth the amounts raised by presidential contenders from January 1, 1975—when the new contribution limits became effective—to September 30: [139]

Wallace	$2,519,713
Jackson	1,704,288
Bentsen	768,735
Ford	706,925
Udall	578,429
Carter	500,221
Reagan	396,412
Sanford	209,631
Shriver [140]	189,782
Shapp	121,742
Bayh	81,782
Harris	77,805

[139] From Federal Campaign Reports (January 1-September 30, 1975), reported in The Washington Star, October 11, 1975, at A-3, cols. 4, 6, except that receipts shown for Harris and Bond are through June 30, 1975, as reported in 1975 Cong. Q. Weekly Rep. 1962 (Sept. 13, 1975).

These figures compare favorably with the amounts raised by Senator McGovern early in his 1972 presidential campaign. As of April 7, 1972—six months closer to the election—McGovern had raised $1,367,820. Affidavit of Marian R. Pearlman, Ex. 4 to Response of Defendants and Intervening Defendants to Plaintiffs' Proposed Findings of Fact, ¶ 10.

[140] Shriver announced his candidacy just three weeks before the end of the reporting period. The Washington Star, Oct. 11, 1975, at A-3, col. 6.

McCarthy	40,040
Bond [141]	11,423

Thus, more than 13 months before the 1976 presidential election, $7.8 million in "seed money" had already been raised under the new contribution limits. And six candidates had already raised more than $500,000, including a once and possibly future third-party candidate, Governor Wallace, and three relatively unknown challengers, Senator Bentsen, Congressman Udall, and former Governor Carter.

As of October 11, 1975, eight candidates have announced that they have qualified for primary matching (Bentsen, Carter, Ford, Harris, Jackson, Shriver, Udall and Wallace). Each of these will receive a substantial sum in federal money for campaign use on January 1, 1976, and will remain eligible to qualify for additional matching funds in 1976. Public financing thus provides a new source of "seed money" to presidential candidates—who require more than congressional candidates—well in advance of the election. This money will substantially augment funds already raised and spent campaigning in 1975. Matching funds thus become, as they were designed to become, a new form of "seed money." [142]

[141] As appellants note, Bond has dropped out of the race. Appellant's Br. 132. Although Bond cited lack of funds as requiring this action, such was often the case with Presidential candidates before imposition of contribution limits. *See, e.g.*, in 1972, 30 Cong. Q. Weekly Rep. 928 (Muskie); *id.* at 587 (McCloskey); *id.* at 726 (Hartke).

[142] Appellants may argue that much of the money raised by presidential candidates thus far has already been spent on fundraising, and that few candidates have accumulated large balances. Even if this were the case, these monies have earned substantial matching funds from the public treasury, which the candidates will receive beginning January 1, 1976 without additional cost to them. The candidates furthermore have benefited in disseminating their views on the issues to the electorate while raising this

In addition, Senator Buckley—a third party candidate and an appellant who challenges these contribution limits—is evidently encountering no difficulty in raising early "seed money" for his 1976 reelection race. Between July 1 and September 30, Buckley reported receipts of $142,631, for a total raised to date of $376,325. His two opponents *together* raised $27,160 during the same period, for a total to date of $52,121.[143]

Appellants' "seed money" argument is also contrary to experience under earlier, voluntary contribution limitations. Ramsey Clark voluntarily imposed a limit of $100 —*one-tenth of the challenged limit*—on all contributions to his 1974 challenge to a three-term incumbent senator. He was able nevertheless to raise sufficient "seed money" to launch a serious campaign. Clark began his fund-raising by sending personal letters to 400 friends and

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money in small contributions. As one of the country's recognized experts in direct-mail fund-raising has recently confirmed:

> "Direct mail is a form of advertising, the same as radio, television and newspapers. Wallace will have communicated with maybe 30 million voters out there by his mailings, and it's a lot more effective than radio or television."

Interview with Richard A. Viguerie, The Washington Post, July 27, 1975, at A-1, A-12. Viguerie went on to say that another benefit of direct-mail fund-raising is that it gives a candidate a chance to develop volunteers and active supporters in every area of the country:

> "[W]hen he [McGovern] went into the primaries, he was going in with the names of 1,000 or 2,000 supporters in every congressional district, and these people had an investment in his campaign, they could be contacted for manning the polls, getting the vote out, you name it. Contrast that with Humphrey or Muskie—he had them outnumbered through his direct mail." *Id.*

See also D. Rosenbloom, Electing Congress: The Financial Dilemma 64 (1970).

[143] "Buckley is Filling His '76 War Chest," The New York Times, Oct. 12, 1975, at 61, col. 4.

acquaintances that raised $12,000-$15,000. Clark used half of this amount to finance a half-page newspaper advertisement that brought in $17,000, and these funds were used to launch a direct-mail campaign. Clark raised additional small contributions through receptions at which he spoke. In all, Clark raised approximately $864,000. The average contribution to the Clark campaign was approximately $20; fewer than 1,000 individuals contributed $100. Findings I, ¶¶ 182, 185-86, 192, IIA J.A. 260-62. Despite certain handicaps arising from the fact that Clark alone imposed such limits on his campaign—such as slow start-up and the cost of raising money—Clark believes he had an adequate opportunity to communicate and to campaign, and that he ran an effective statewide campaign. Findings I, ¶¶ 190, 192, IIA J.A. 262.[144]

Senator Mathias also voluntarily imposed a $100 limit on contributions to his Senate campaign. As the district court found, Mathias successfully raised $290,000 from at least 8,500 individuals. Findings I, ¶¶ 173-76, IIA J.A. 257-59. As appellants point out (Br. 136), Senator Mathias' campaign had $50,000 on hand when he imposed this limitation; but even a significant portion of

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[144] Appellants cite Clark's statement that while Javits appeared to outspend him by a ratio of 3 to 2, in fact he was really outspent 2 to 1 because of the extra cost of raising small contributions. Appellants' Br. 134-35. Any message to be drawn neglects the fact that Javits' fund-raising in 1974 was not subject to the FECA limits and Javits focused on large contributions. Only 6.1% of the more than $1 million which he raised was in contributions of $100 or less. *See* Reports of Receipts and Expenditures filed with the Secretary of the Senate for the period September 1, 1973 through December 31, 1974 by Senator Jacob Javits and political committees supporting him.

this amount had been raised in contributions of less than $100. *Id.* at ¶¶ 174, 176, IIA J.A. 258-59.[145]

Similarly, Senator McGovern financed the first national direct-mail appeal in his 1972 presidential campaign with $27,813, comprised of a $10,000 loan and 44 contributions averaging $405. That direct-mail appeal and subsequent appeals during the next year raised contributions from over 42,000 individuals totaling over $1,250,000.[146]

These examples—reflecting the experiences of challengers and incumbents and one third party candidate—refute appellants' contentions that "seed money" must be raised in large contributions and that this is particularly true for challengers and third party candidates. More-

[145] "Before Senator Mathias announced these limitations, his campaign organization had raised $118,745 from approximately 546 contributors. (After paying 1968 campaign debts and pre-campaign obligations, this amount was reduced to approximately $50,000.) The $118,745 was raised from 302 contributions of $100 or less totalling $25,045, and 239 contributions of more than $100 totalling $93,700. The average contribution was $217." Findings I, ¶ 174, IIA J.A. 258.

[146] Affidavit of Marian R. Pearlman, *supra* note 139, ¶¶ 7-12. Pearlman was Treasurer of McGovern's campaign; it is her opinion that:

> ". . . [I]t is possible for a candidate for the presidential nomination of a major party, having little national name recognition at the outset, to begin and conduct a successful campaign for that nomination without heavy reliance on large contributions from private individuals. By using techniques such as direct-mail solicitation, it is possible for a candidate to solicit and receive substantial amounts of money to finance such a campaign while relying largely or entirely on small contributions from a large number of individuals. Moreover, also on the basis of my experience with the McGovern for President Campaign, I have concluded that it is possible to finance a serious campaign for election as President of the United States primarily or solely on the basis of relatively small contributions from a large number of individuals." *Id.*, ¶ 4.

over, there is no showing that the contribution limits will augment any advantages incumbents already possess in raising "seed money." Appellants have not shown that the relative abilities of incumbents and challengers to raise small contributions for "seed money" differ.

Appellants argue that, in "close" races, challengers rely more heavily on loans in excess of the contribution limits for "seed money" than do incumbents. Appellants' Br. 129. However, loans that would have been precluded by the contribution limits have played a *de minimis* role in financing the campaigns of challengers in close races. Appellants neglect to state that the challenged statutes do not forbid most campaign loans. 18 U.S.C. §§ 608, 610. Approximately 68 percent of the $5.6 million lent to 1974 congressional candidates would have been unaffected by the new law, because it consisted of loans which the new law continues to permit: loans by candidates to their own campaigns up to $25,000 for a House race and $35,000 for a Senate race; loans of any amount from banks acting in the ordinary course of business as long as no individual endorses or guarantees the loans in an amount over $1,000; and loans from or guaranteed by individuals in amounts up to $1,000.[147] *See* p. 214, *infra.*

The challenged statutes would have affected only a small number of loans to 1974 challengers in "close" races, constituting only a small portion of the total funds raised by such candidates. Only 22 of the 81 challengers

[147] Derived from an extensive computer printout reflecting all individual contributions (including loans) of $500 or more to candidates in the 1974 congressional elections. This printout was provided in response to a request by appellants for production of documents, and is incorporated by reference in the findings below, Findings IIC, ¶ 6, IIB J.A. 665.

received *any* loans that would have been restricted by the 1974 law. In 15 of these 22 cases, the restricted loans represent less than five percent of the total funds raised by the challenger. In only two cases did the restricted loans represent more than ten percent of the challenger's total funds. *See* Findings IIC, ¶ 6, IIB J.A. 665; *id.* ¶ 1, IIB J.A. 586. Only three of the six Senate challengers in "close" 1974 races received any loans that would have been prohibited by the 1974 law. These represented 7.6 percent, 7.4 percent, and 0.4 percent of the total funds raised by the three affected challengers. *See id.*

At bottom, appellants argue that the Constitution forbids a remedy for improper influence in the situations that—by appellants' own contention—present the greatest potential for such influence. If appellants are correct, the candidate in need of "seed money" may be the one most utterly dependent on the benevolence of one or a small handful of political "angels" and may, therefore, be forever obligated to them. Appellants gain little by marshaling examples where a generous few have financed "worthy" causes; they are overwhelmed by the counter-examples evidencing the threat and appearance of pernicious influence. *See* Part IIIA, *supra*.

Precisely because it was so seductively easy to raise "seed money" in large contributions, candidates did so. That fact, even if proven, is not evidence that start-up financing cannot be obtained under the challenged limits. And the experience to date, discussed above, belies appellants' fears. If some challengers or minor party candidates remain who have problems raising early money, the reason may be lack of popular support. Professor Bickel, who believed that it would be "both wise and lawful" for Congress to impose contribution limits, proposed to deal

"with the problem of the remaining inequality among candidates by recognizing its legitimacy insofar as it reflects inequality in support, in initial support.

"I think the political system ought not to be embarrassed by that kind of inequality. That is the heart of it. Inequality of support is what finally decides elections, and inequality of initial support embarrasses me no more." [148]

3. *Appellants Have Failed To Prove that the $500 Exclusion for Incidental Expenses of Volunteers Violates Their First Amendment Rights*

The challenged legislation carefully excludes from the definition of "contribution" (and thus permits without limitation) personal services of all kinds provided by volunteers. 18 U.S.C. § 591(e)(5)(A). Certain incidental expenses which volunteers may incur, such as unreimbursed travel expenses, are deemed contributions to the extent they exceed $500. 18 U.S.C. § 591(e)(5). Appellants suggest that this $500 exclusion "typifies" the "repressive spirit" of the FECA Amendments, and their "gross intrusion . . . into the political activities of American citizens." Appellants' Br. 138. But the exclusion actually has the effect of allowing additional financial contributions to a campaign on top of the $1,000 contribution limit. As the court of appeals held, some limit must be placed on the exclusion as a "necessary loophole-closing provision designed to prevent contributions by indirection." This provision allows "sufficient flexibility for effective volunteer campaign assistance, without opening the door to wholesale circumvention of contribution and expenditure limits." Ct. App. Op. 1534.

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[148] Commentary, *supra* note 31, at 67.

4. *Appellants Have Failed To Prove That the Limit on Contributions by Political Committees Is Unreasonable or Discriminatory*

Appellants make two contradictory attacks on the provisions of the challenged statutes relating to contributions by political committees. Appellants first argue that the FECA has increased the relative influence of special interest groups by permitting any group of individuals that qualifies as a "political committee" under Section 608(b)(2) to contribute $5,000 to a candidate and by allowing organized interest groups such as labor unions and corporations to proliferate political committees. Appellants' Br. 68-71. Appellants claim that the legislation does not effectively dampen the ability of economic interest groups such as the dairy industry to give unlimited amounts to candidates, because "[e]very county organization" can have a political committee entitled to give up to $5,000 apiece to an unlimited number of candidates. *Id.* at 69.

To the contrary, the appellants have provided no evidence that these provisions permit circumvention of the individual or group contribution limits; the statutory scheme itself precludes the result appellants fear. To qualify, a political committee must have been registered with the FEC [149] for at least six months, have received

[149] 2 U.S.C. § 433 requires political committees to file a statement of organization with the FEC, a statement designed to ensure that political committees are in truth separate organizations. For example, the statute requires a statement of "the names, addresses, and relationships of affiliated or connected organizations," § 433(b)(2), and a statement of the continuing nature of the committee and the planned disposition of residual funds in the event of the committee's dissolution. Section 433(b)(7), (8). Furthermore, Section 434 requires political committees to report receipts and expenditures to the FEC; included in each report must be the name and address of each political committee or candidate to or from which the committee has made any transfer of funds. 2 U.S.C. § 434(b)(4).

contributions from more than 50 persons, and (except for any state political party organization) have made contributions to five or more candidates for federal office. 18 U.S.C. § 608(b)(2).

The legislative history of Section 608(b) manifests Congress' intent that only truly autonomous political committees receive the benefit of the $5,000 limit. For example, the Conference Report contains the following language:

> "A . . . question was raised . . . regarding the possibility of circumventing the limit on contributions by political committees where a national committee of a political organization may contribute the maximum allowable amount to a candidate and a state or local sub-unit or subsidiary of that committee may also contribute to the same candidate. It was the intent of the House Committee to allow the maximum contribution from each level of the organization *if the decision or judgment to make such contributions is independently exercised within the separate levels of the organization.* However, if the subsidiary or sub-unit organizations are under the control or direction of the parent organization with respect to their contributions to specific candidates, then *the organizations acting in concert would constitute one political committee* for the purpose of the contribution limits included in the House amendment bill." [150]

Moreover, appellants' tidy theoretical argument is contrary to the facts. Appellants focus on the dairy in-

[150] S. Conf. Rep. No. 1237, 93d Cong., 2d Sess. 51-52 (1974) (emphasis added). The Conference Report goes on to state that the conferees agree with the analysis of the House Report regarding the rule for application of contribution limits and the need to prevent circumvention of such limitations. *Id.*; *see also* H.R. Rep. No. 1239, *supra* note 56, at 5.

dustry, because of its prominent role in recent elections,[151] and assert that "*dairy interests can give unlimited amounts to a candidate*" through county organizations. Appellants' Br. 69 (emphasis in original). In practice, however, the power of dairy interests in making political contributions stemmed from the fact that a handful of individuals controlled contributions in vast amounts raised from across the country. On June 30, 1975, the single most important dairy committee, "the political action arm of the Associated Milk Producers, Inc.," had a cash balance on hand of $1,813,060; two other dairy committees had balances in excess of $300,000 each. The Washington Post, Sept. 21, 1975, at A-2, cols. 3, 7. Had the challenged contribution limits not been enacted, these committees would today be free to give the entire $2.4 million to a single presidential candidate—with or without the benefit of a meeting in the oval office. Under the limits appellants attack, these three committees may give no more than a total of $15,000 to a single candidate.

Second, appellants attack (Br. 141-42) as an undue burden on political activity the six-month and 50-person requirements for qualified political committees—provisions obviously designed to avoid the very artificial proliferation of committees that appellants fear. The requirements prevent individuals or groups from making cumulative contributions by forming and dissolving new political committees throughout a campaign. They also inhibit the formation of small committees that exist solely for the purpose of evading the contribution limits. *See* Ct. App. Op. 1536. Together with the requirement that a qualified committee support five or more candidates, these requirements serve to ensure the general legitimacy of

[151] *See* Findings I, ¶¶ 103, 158, IIA J.A. 101-07, 254.

political committees without preventing groups from expressing their collective political views. And of course, groups of individuals who cannot meet the requirements for qualified political committess are still free to pool their resources by forming a non-qualifying committee that makes contributions subject to the general $1,000 limit applicable to contributions by any "person" other than a qualified political committee. 18 U.S.C. § 608(b)(1).

The six-month requirement for the duration of a political committee is not an impermissible burden on the ability of citizens to engage in political activity. The six-month rule is merely a condition on the availability of the favorable contribution limit for bona fide organizations. Even where an actual restriction is involved, the Court has upheld such reasonable time limitations if, as here, they are tied to a particularized legitimate legislative purpose. *See Rosario* v. *Rockefeller*, 410 U.S. 752 (1973); *Kusper* v. *Pontikes*, 414 U.S. 51 (1973); *Marston* v. *Lewis*, 410 U.S. 679 (1973).

5. *Appellants Have Failed To Prove That the Limits on Expenditures from a Candidate's Personal or Family Funds Are Discriminatory*

Appellants assert that the limitations on the expenditures from a candidate's personal or immediate family funds (18 U.S.C. § 608(a)), invidiously discriminate against candidates without wealthy families. Appellants' Br. 139-40. However, Section 608(a) decreases the advantages already possessed by wealthy candidates. Prior to its enactment, candidates pumped tremendous family fortunes into their election effects. *See* p. 73, *supra*. The Constitution permits ameliorative legislation to eradicate existing inequality one step at a time. *Katzenbach* v. *Morgan*, 384 U.S. 641, 657 (1966); *see also Williamson*

v. *Lee Optical Co.*, 348 U.S. 483, 489 (1955). Moreover, there is no evidence that any appellant would have been harmed in the past or expects to be harmed in the future by the limits in the section. *See supra* p. 25.

6. *Appellants Have Failed To Prove That The $25,000 Aggregate Limit on Individual Contributions Is Discriminatory*

Appellants assert that the $25,000 limit on aggregate individual contributions to all candidates in a given election (18 U.S.C. § 608(b)(3)) discriminates against third party and independent candidates because donors will prefer to give their allotted amount to major party candidates who they believe have better chances for victory. Appellants' Br. 138. Yet the Chairman of appellant Libertarian Party has admitted that prior to January 1, 1975, large contributors gave to major party candidates anyway. Crane Deposition Tr. at 25-27. Not one contribution made in 1974 by an individual who gave $25,000 or more in contributions of $500 or more went to a minor party or independent candidate. *See* Findings IIC, ¶ 6, IIB J.A. 665. Appellant McCarthy—the only independent candidate before this Court—is unable to state whether the $25,000 aggregate limit might harm his campaign. Findings III, McCarthy ¶ 26, IIB J.A. 718. Appellants have not proven their case.

B. Appellants Have Failed To Prove That the Particular Expenditure Ceilings Chosen by Congress Are Unreasonable or Discriminatory

As with contribution limits, appellants' attack on expenditure ceilings is twofold: First, they assert that the First Amendment forbids Congress to establish *any* ceiling on candidate expenditures. We answer that argument in Part IV, above.

Second, appellants assert that the particular ceilings imposed by Congress are (1) too low to permit candidates to conduct "effective" campaigns, and (2) discriminatory in their effects, favoring incumbents and major party candidates over challengers and minor party and independent candidates. As demonstrated below, appellants have failed to prove either part of this contention.

1. *Appellants Have Failed To Prove That the Expenditure Ceilings Prevent Any Class of Candidates from Conducting "Effective" Campaigns*

This Court is in no position on the present record to tell Congress that it should have chosen different expenditure limits in Section 608(c). The choice of ceilings that will achieve the statutory objectives without preventing effective campaigns is peculiarly a legislative function. Congress, not the judiciary, is equipped to collect and review the wide-ranging evidence bearing on that choice. It has studied the problems of campaign finance for years, held months of hearings, and debated the practical questions at length. On such a matter of line-drawing, the case for judicial deference to legislative judgment is most powerful. *See* pp. 38-39, *supra*.

Moreover, nothing in this record suggests that the ceilings are unconstitutionally low. Appellants have sued before it is possible to see the results of even one regular election year in which the ceilings were in effect. Accordingly, the best available data are the spending figures for the 1972 and 1974 elections, set forth in the district court's findings. They show that the ceilings are not out of line with past expenditures.

In choosing limits, Congress had different objectives with respect to congressional and presidential campaigns. For congressional races, the limits are designed merely to slow further increases in spending, while for presidential races, it was essential to *roll back* the amount candidates could spend, because spending in presidential races had risen intolerably—to a point far beyond the needs of an "effective" campaign. The 1972 and 1974 figures suggest that these are exactly the effects the ceilings will have on future races.

In 1972, out of 1,009 candidates who ran in the general election for House seats, only 21, or 2.1 percent, reported total spending higher than $168,000 (the combined primary and general election ceiling, including fund-raising costs, for House candidates under Section 608(c)).[152] In 1974, of the 1,056 House candidates who ran in the general election, only 22, or 2.1 percent, spent

[152] Findings IIA, ¶¶ 40-41, IIB J.A. 448-49. Section 608(c) permits House candidates to spend $70,000 in the primary and $70,000 in the general election. Section 591(f)(4)(H) permits an additional 20 percent of the total for fund-raising. Under the statute, all expenditure ceilings are adjusted in each election year for changes in the consumer price index. The legislative history makes clear that a candidate can spend the full amount of his primary allowance regardless of whether he faces primary opposition, *see* Appendix A at 2a-3a, and the FEC has so ruled. Advisory Opinion 1975-9, 40 Fed. Reg. 36242 (Aug. 19, 1975).

These findings compare total reported spending in 1972 and 1974 to the combined limits for primaries and general elections. This is the only meaningful and accurate comparison that can be made from the reports filed in 1972 and 1974 under the FECA of 1971. Separate comparisons for primaries and general elections in 1972 and 1974 cannot be made in any meaningful way because it is impossible to determine from the reports filed for those years whether an expenditure was made to influence a primary or general election. *See* Appendix A at 4a-5a.

more than the combined spending ceiling in Section 608(c). Findings IIA, ¶¶ 18-19, IIB J.A. 442-43. Thus the overwhelming majority of House candidates spent less than the ceiling in conducting their campaigns, winning and losing.

The figures for Senate elections support the same conclusion. In 1972, of the 106 senatorial candidates who ran in the general election, only 18, or 17 percent, exceeded the combined primary and general election spending limit (9.6 cents per voting age person in a primary and 14.4 cents in a general election, including fund-raising costs). Findings IIA, ¶¶ 44, 47-48, IIB J.A. 449-50. In 1974, of the 105 senatorial candidates who ran in the general election, only 17, or 16 percent, exceeded the combined spending limit. Findings IIA, ¶¶ 23, 28-29, IIB J.A. 444-45.

Adding the figures for House and Senate races in 1972, only 39 out of 1115 candidates, or *3.5 percent*, exceeded the new limits. Adding the figures for 1974, only 39 out of 1161 candidates, or *3.4 percent*, exceeded these limits.[153]

In the 1972 presidential election, both major party candidates exceeded the combined spending ceiling ($10 million in primaries and $20 million in the general election plus fund-raising costs).[154] Former President Nixon reported spending approximately $55 million, and Senator McGovern reported spending approximately $38 million. Findings IIA, ¶ 51, IIB J.A. 451. The excessive fund-raising and spending in that race, and the abuses that

[153] In any event, the district court found that "most politicians agree that one-half of campaign expenditures are wasted, but no one knows which half." Findings I, ¶ 197, IIA J.A. 264.

resulted, were significant factors in the public demand and the congressional decision to impose ceilings lower than those amounts. The ceilings Congress selected were higher than the spending in any presidential campaign before 1972. Findings I, ¶¶ 12, 89, IIA J.A. 9-10, 49-51. Moreover, they were higher than what President Nixon's own finance chairman testified would have been sufficient in 1972. *See* p. 70, *supra*.

Further confirmation that the new limits permit "effective" campaigns comes from the first Senate race held under the new laws, the Durkin-Wyman New Hampshire special election in September. Both candidates reported expenditures within the new ceilings; yet they succeeded in turning out almost 40,000 more votes (some 18 percent) above what the same two candidates polled in their 1974 race without spending limits.[155]

Appellants attempt to show the impossibility of "effective" campaigns under the ceilings by describing an elaborate hypothetical—admittedly based on New Hampshire—in which the only newspaper in the district is "implacably opposed" to the challenger, other media mostly reach an audience outside the district, and the challenger faces a long-time incumbent Appellants' Br. 79-80. The Wyman-Durkin race shows the fallacy of looking to hypotheticals rather than facts.

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[154] Appellants incorrectly claim (Br. 84) that the Act limits the portion of general election funds a presidential candidate may spend in any one state. Only primary spending is limited to twice the Senate limit for that state. *Compare* Section 608(c)(1)(A) *with* Section 608(c)(1)(B).

[155] 1975 Cong. Q. Weekly Rep. 1995 (Sept. 20, 1975) (based on unofficial spending figures; the official reports were not available at this printing).

Wyman was endorsed by the only major newspaper, The Manchester Union Leader. He was assisted by campaign visits from the incumbent President and the President's chief rival for the 1976 Republican nomination. He was a 5-term Congressman from one of the state's two congressional districts, while Durkin's only previous offices were New Hampshire insurance commissioner and moderator of a Massachusetts town. Yet Durkin won with 53.6 percent of the vote. The ceilings necessarily caused some adjustments in the campaigns, but they certainly did not prevent "effective" campaigning.[156]

Appellants unsuccessfully attempt to draw contrary conclusions from expenditures in selected past races. They assert that, "on the basis of estimates for general election expenditures in the Senate" in 1972, 33 candidates exceeded the general election ceilings and the ceilings "would have eliminated one-third of total spending." Appellants' Br. 89. Those comparisons are based entirely on the Cole study, whose unreliability we have demonstrated in Appendix A and which the court of appeals properly disregarded. Since the errors in Cole's methodology overstate the 1972 spending in relation to the limits, they render his conclusions useless in predicting what effects the limits will have. In particular, Cole errone-

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[156] *Id.* at 1933-94 (Sept. 6, 1975), 1995 (Sept. 20, 1975); 7 Nat'l. J. Rep. 1339 (Sept. 20, 1975).

Moreover, as noted above (p. 90), the "effectiveness" of the 1976 and later campaigns may well be enhanced by an extraneous factor, the recent Federal Communications Commission ruling permitting radio and television coverage of candidate press conferences and candidate debates, free of the "equal time" restriction of Section 315 of the Communications Act. Until the results of this important change are fully known, no one can predict with confidence the minimum expenditure necessary to conduct an "effective" campaign.

ously counted as general election spending all spending during primary periods where the candidate had no serious primary opposition or was unopposed. *See* Appendix A at 3a-4a. Thus Cole has incorrectly compared the total amount spent over the full course of an election —including the primary and general election periods— with the ceilings in the challenged statutes for just one period: the general election.

Appellants attempt to justify this methodology by asserting, as did Cole, that candidates who "had serious opposition in no more than one election" aimed "the overwhelming bulk" of their spending at the more contested election. Appellants' Br. 89. As we show in Appendix A, there is no proof that this assertion is true. Even if it were true about past elections, candidates in such situations in the future will not be limited to spending only half the combined ceiling. These laws permit even a candidate who has no primary opposition to spend up to the primary ceiling during the primary period without counting it toward his general election ceiling. Thus, even if some candidates in past years have bunched their spending in the general election period, they will be free to adjust their spending to take advantage of the combined ceilings. Appellants' comparisons of total spending against partial ceilings say nothing about how the statutes will actually operate.

Appellants argue that for those who run in "fully contested" races the combined overall spending limits will "dramatically restrict" campaigns. Appellants' Br. 89. They have produced a table which simply indicates that of the 2,065 candidates who ran for the House in 1972 and 1974,[157] 66 spent in excess of the FECA limits (adjusted for inflation). *Id.* at 90. And having defined a class of candidates they consider so important—those who had "serious opposition in both primary and general elections"—appellants can find only 20 such candidates who exceeded the overall combined spending limits in all 1972 and 1974 House races.

[157] Findings IIA, ¶¶ 18-19, 40-41, IIB J.A. 442-43, 448-49.

Appellants offer a second table to prove that "'high' spending occurs in the most competitive races." *Id.* at 90-91. But the table itself shows that, even in the most hotly contested House races in 1972 and 1974 (those in which the winner received 55 percent or less of the vote), the average spending of the winners was far below the $168,000 limit. For example, according to the table in 1974 the average total expenditures by both winners ($95,544) and losers ($85,606) were each approximately one-half of the overall House spending limit ($168,000). And appellants' use of average figures has little meaning in analyzing Senate races, since the spending limit for Senate races varies with the population of each state; thus the average figure has no relation to the limit for any given state.

Appellants' third table (Br. 95) is of minimal value because the sample of candidates is so small. For example, in 1972 only 10 House challengers (out of 323) beat an incumbent. Thus the 40 percent figure—representing successful challengers in 1972 who spent in excess of the overall limit adjusted for inflation—is in reality four individuals. In 1974 almost half of the winning challengers (18 out of 40) spent less than $84,000. Only one winning challenger spent more than the $168,000 overall limit. Findings IIA, ¶¶ 3, 5, IIA J.A. 269-318, 326-86. In sum, none of appellants' tables provides the slightest support for appellants' arguments about dis-

crimination against challengers or minor party or independent candidates.

Appellants cite only one additional piece of evidence to show that the limits will prevent "effective" campaigning—Cole's conclusion that in the 1972 Senate campaigns one phone call or letter cost approximately 20 cents. Comparing that figure to the combined ceiling of 24 cents per eligible voter, appellants conclude that the "statutory limits are so low as to lack a rational basis." Appellants' Br. 92. The comparison proves nothing. No candidate, so far as we know, has ever thought that telephoning or writing every voter was an effective way to spend campaign money.[158] In 1972 and 1974, when spending was not limited and candidates to whom the money was available presumably spent what was necessary for "effective" campaigns, all but a handful of House and Senate candidates spent below the new limits. Pp. 136-37, *supra*. Their spending proves the irrelevance of appellants' 20-cent figure.

Appellants next argue (Br. 94) that because the costs of campaigning differ from state to state and among congressional districts, it was irrational for Congress to impose identical spending ceilings for all House races and identical per-voter ceilings for all Senate races.[159] They assert that Congress was obliged to adopt a tailor-made ceiling for each race to reflect the many factors that determine the relative cost of effective electioneering in different areas.

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[158] Appellants analyze McCarthy's and Nixon's spending in 1968 on the basis of money spent per vote received by them. Appellants' Br. 97. Such a comparison is of no relevance in analyzing expenditure limits expressed in terms of money spent per eligible voter.

[159] As noted above, House races in states having only one Representative are treated the same as Senate races by Section 608(c).

Such a requirement would demand impossible precision of Congress and would create dangerous opportunities for gerrymandering of the ceilings. The statute books are full of laws with numerical ceilings that apply throughout the nation—such as the personal exemption from income tax, the minimum wage, and license and filing fees. Appellants' argument would require each of these to be revised to reflect local conditions. This Court has consistently held that Congress may prescribe a general remedy for an evil that arises in various forms or degrees, where it would not be practicable or desirable to deal with each specific problem individually. *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 487-88 (1955).

The choice of ceilings is a legislative judgment entitled to judicial deference. This is particularly true where Congress, after careful deliberation, has made such a judgment on a matter uniquely within its own field of expertise. This Court has no warrant to invalidate the ceilings before they have had a chance to work, unless appellants can show that Congress' choice was manifestly unreasonable. Nothing in the record supports such a conclusion.

2. *Appellants Have Failed To Prove That the Expenditure Ceilings Will In Practice Discriminate In Favor of Incumbents and Major Party Candidates*

Appellants make the paradoxical claim that, because the spending ceilings apply equally to all candidates in any race, they will be discriminatory in their practical effect. As with contribution limits, their theory is that candidates who lack the advantages of incumbency or major party sponsorship need some way to overcome their

crimination against challengers or minor party or independent candidates.

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handicaps, and that they are constitutionally entitled to do so by outspending their opponents—and exceeding the expenditure ceilings.[160]

Appellants' argument would not make out a claim of unconstitutional discrimination even if they could show that challengers and minor party candidates had, on the average, outspent their rivals in the past as a way to overcome other disadvantages. Every evenhanded law affects some people more than others, because the circumstances of life are varied. Absent a showing that a law, equal on its face, will affect only or predominantly a single group, minor variations in the incidence of the law do not show unconstitutional discrimination. And Congress need not provide exceptions from evenhanded laws for every person or group who may labor under handicaps unrelated to the laws. *See* pp. 113-14, *supra*.

[160] Under the authority of the Act, the FEC is acting to administer the law in such a way that political activities of incumbents, such as the use of private office accounts, are treated in the same way as political activities of non-incumbent candidates. *See* FEC Notice 1975-18, 40 Fed. Reg. 32951 (Aug. 5, 1975); S. Rep. No. 409, 94th Cong., 1st Sess. 13 (1975). The Senate recently rejected two of the Commission's regulations on office accounts, but not on the ground that incumbents' advantages were reduced by the proposed regulations. The Senate concluded that equality between incumbents and non-incumbents would be better promoted by imposing identical treatment on all federal officeholders and non-officeholders, and that the proposed regulations did not adequately accomplish this end. 120 Cong. Rec. S 17872-88 (daily ed. Oct. 8, 1975); S. Rep. No. 409, *supra*, at 2-4. The Commission intends to propose a revised regulation taking into account this concern. The Washington Post, Oct. 10, 1975, at A-3, col. 1. Senator Buckley, who opposes incumbents' advantages in this lawsuit, was the deciding vote in a 48 to 47 vote to reject the proposed regulations. We assume he would not have voted against the proposed regulations if to do so served to promote incumbents' advantages.

In any event, appellants have failed to show that the ceilings will impinge any more on challengers or minor party and independent candidates than on their opponents. On the contrary, the statistics from the 1972 and 1974 elections show that challengers and minor party and independent candidates generally have been outspent in the past by incumbents and major party candidates. Thus, they will be no worse off—and in a number of cases better off—in relative terms under the ceilings than they would have been in their absence.

Incumbents have demonstrated their ability, in the absence of ceilings, to raise and spend more money than challengers. In the 1972 and 1974 House and Senate elections, with no ceilings, incumbents outspent their major party challengers by about $62.4 million to $36.5 million. Findings IIA, ¶¶ 14, 24, 37, 45, IIB J.A. 442, 444, 447-48, 449.[161] In those elections, more challengers would have been helped than hurt if the expenditure ceilings had been in effect. In all 1972 and 1974 congressional races, the ceilings would have operated to reduce the spending of 32 incumbents but only 15 challengers—and of these 15 challengers, six were outspent by their incumbent opponents. Findings IIA, ¶¶ 5, 8, 28, 47, IIA J.A. 326-86, IIB J.A. 422-31, 445, 450. Thus, only nine challengers in the approximately 700 congressional races in 1972 and 1974 involving incumbents and challengers spent more than the ceilings and also outspent their incumbent opponents. Findings IIA,

[161] In 1974, incumbents outspent their major party challengers in 21 of 22 Senate races and 252 of 323 House races. Findings IIA, ¶¶ 21, 31, IIB J.A. 443, 445. In 1972, incumbents outspent their major party challengers in 19 of 25 Senate races and 249 of 321 House races. Findings IIA, ¶¶ 43, 50, IIB J.A. 449, 450.

¶¶ 14, 24, 37, 45, IIB J.A. 442, 444, 447-48, 449. In the more numerous cases where incumbents exceeded both the ceilings and their challengers' spending, the ceilings would have benefited the challengers.[162]

Appellants say that it is in "close" races that the limits most discriminate against challengers. Appellants' Br. 98-99. To the contrary, the expenditure ceilings may help challengers when the races are close. For example, in 1974 there were nine Senate races in which the winner received less than 55 percent of the vote in the general election. Eight were won by incumbents and one by a challenger. The eight winning incumbents all substantially outspent their major party challengers, and five of the eight would have exceeded the new ceilings. Findings IIA, ¶ 33, IIB J.A. 446-47. For example, Senator Henry Bellmon in 1974 spent $622,480 compared with $195,429 spent by his challenger Ed Edmundson. The new ceiling for Oklahoma is $450,960. Bellmon received 49.4 percent of the vote compared with 48.9 percent received by Edmundson. Findings IIA, ¶ 33, IIB J.A. 446. In 1974 Representative Sam Steiger spent $203,899 as opposed to $68,203 spent by his challenger, Pat Bosch. The combined ceiling for House races is $168,000. Steiger received 51.1 percent of the vote compared with 48.9 percent received by Bosch. Findings IIA, ¶ 5, IIA J.A. 328. At the very least, these facts of record establish the failure of appellants to prove that the new ceilings will make challengers as a group worse off, relative to incumbents as a group, than they would have been if the ceilings had never been enacted.

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[162] Appellants' affiant Cole conceded this fact. Cole Deposition Tr. at 304-05.

The 1972 and 1974 results are even more striking in what they show about the relative spending power of minor party and independent candidates vis-a-vis major party candidates. Minor party and independent candidates were grossly outspent by major party candidates in the 1972 and 1974 congressional elections, when no ceilings were in effect. They were outspent by 40 to 1 in 1972 and 65 to 1 in 1974. Findings IIA, ¶¶ 12, 35, IIB J.A. 441, 447. In 1972 and 1974, only one of the 42 House candidates who exceeded the ceilings was a minor party or independent candidate, former Representative Allard Lowenstein of New York.[163] None of the 35 Senate candidates who exceeded the ceilings was a minor party or independent candidate.[164]

Considering all 1972 and 1974 races together, the new ceilings would have reduced the spending of 76 major

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[163] Lowenstein ran as a Liberal in the 1972 general election after losing in a Democratic primary and a court-ordered second primary against a Democratic incumbent. His total spending was $285,475. Of the 192 other minor party and independent House candidates in 1972, only 18 spent more than $10,000. Findings IIA, ¶¶ 40-41, IIB J.A. 448-49.

In 1974, the highest amount spent by any of the 246 minor party and independent House candidates was $85,680 by Don Elliott of New York. Elliott ran as a Liberal in the general election following his defeat in the Democratic primary by the incumbent. Of the remaining 245 minor party and independent candidates, only 15 reported spending more than $10,000. Findings IIA, ¶¶ 18-19, IIB J.A. 442-43.

[164] In 1972, the highest amount spent by any of the 40 minor party and independent Senate candidates was $394,510 by John McKeithen, an independent candidate in Louisiana. Only one other such candidate spent over $10,000. Findings IIA, ¶¶ 47-48, IIB J.A. 450.

In 1974, the highest amount spent by any of the 40 minor party and independent Senate candidates was $192,462 by Barbara A. Keating, the Conservative Party candidate in New York. Only two other such candidates spent over $20,000. Findings IIA, ¶¶ 28-29, IIB J.A. 445.

party candidates but only one minor party candidate. Clearly, minor party and independent candidates as a group will be better off in spending ability vis-a-vis major party candidates than they would have been if the ceilings had not been enacted.[165] At the very least, the contrary has not been proved.

In any event, no firm relationship has been established between outspending one's opponent and winning elections. While there were occasional instances in which a challenger outspent an incumbent and also won the election, there were other instances in which an outspending challenger lost, or in which a challenger won without outspending the incumbent. For instance, even if appellants' figures were accepted, of the five challengers who outspent an incumbent in the 1972 Senate general elections, two won and three lost. Findings IIB, ¶¶ 4-6, IIB J.A. 573-74. In 1972 and 1974 congressional races, there were a total of 57 races in which a challenger defeated an incumbent in the general election. The challenger outspent the incumbent in 34 of these races and was outspent by the incumbent in 23 of these races. Findings IIA, ¶¶ 34, 36, IIB J.A. 447. Even if the correlation between spending and winning were much closer, causation would not be shown; the correlation might indicate that money flows to likely winners,[166] or that both

[165] The 1972 presidential election shows the same pattern. Both major party candidates exceeded the new spending ceiling for presidential candidates. The eight minor party candidates and three independent candidates altogether reported spending $1,005,000—only one percent of the total spending reported by the two major party candidates. Findings IIA, ¶ 51, IIB J.A. 451. Obviously, none of the minor party or independent candidates even approached the ceiling; all will thus be better off vis-a-vis major party candidates under the new ceilings.

[166] Appellant Buckley adopts this view. Buckley Affidavit, ¶ 8.

money and votes flow to candidates with other traits that win elections.[167]

Appellants seek to avoid the force of these statistics by focusing on selected individual races and proffering hypothetical and unsubstantiated theories. They argue that there is a "floor" of spending that a challenger must reach "to be 'viable,' to obtain the voter recognition that permits a campaign to attract votes." Appellants' Br. 97. If any such "floor" exists, appellants have not shown that the ceilings will prevent candidates from reaching it. Of the seven challengers who beat Senate incumbents in the 1972 and 1974 general elections, only one spent more than the new ceiling of 24 cents per eligible voter. Findings IIA, ¶¶ 30, 47, IIB J.A. 445, 450. In the five 1972 Senate races appellants characterize as "high-spending" (Br. 96), three of the victorious challengers spent (with an inflation adjustment) less than $300,000—the lowest combined ceiling for the Senate in any state—and another exceeded it by less than $10,000. Findings IIA, ¶ 4, IIA J.A. 319-25. These results suggest that the ceilings will not prevent Senate candidates from reaching the "floor," if any floor exists.

The statistics on House elections point the same way. Of the 50 challengers who beat House incumbents in the 1972 and 1974 general elections, only two spent more than the new ceiling of $168,000. Findings IIA, ¶¶ 20, 21, 42, 43, IIB J.A. 443, 449. Challengers in 1974 House races defeated incumbents while spending as little as $15,846 (David Evans), $33,064 (Gary Myers), $36,227

[167] *See* Affidavit of John J. McGowan, Ex. 3 to Response of Defendants and Intervening Defendants to Plaintiffs' Proposed Findings of Fact, ¶ 6c-e; Findings I, ¶ 4, IIA J.A. 5-6; Appendix A at 1a-2a.

(Pattison), $44,423 (Downey), $42,271 (Weaver), $44,-920 (Lloyd), and $47,336 (Jacobs). *Id.*, ¶ 5, IIA J.A. 327-86. In five of these seven races, the challengers faced contested primaries before the general election. House candidates also won open races not involving an incumbent in 1974 while spending as little as $14,841 (Nowak), $20,583 (Beard), $29,398 (Hall), $29,965 (Schulze), $38,819 (Edgar), $42,944 (Goodling). Five of these six winners had contested primaries. *Id.*

Appellants hypothesize a comparative "marginal utility of initial spending" theory to support their paradoxical claim that incumbents are favored over challengers by any ceilings that apply equally to both. Appellants' Br. 97-98. They assert that, because challengers often start as relative unknowns, they get more impact than incumbents do from their initial campaign spending, until they "obtain the voter recognition that enables a campaign to attract votes." *Id.* at 97.

Even if it were sound, the theory would not impugn these ceilings. It would support only an argument that the ceilings should be high enough to permit challengers to reach a hypothetical "floor"—which, as we have shown, these ceilings clearly do. But the theory is not sound, because it disregards incumbents' unquestioned ability to raise and spend more money. The net result would vary with the circumstances of each case—which renders the theory useless in proving discrimination between groups.

In sum, appellants' contention that the expenditure ceilings will favor incumbents rests on inconclusive data and unsupported hypotheses. As the court of appeals concluded:

> "Plaintiffs contend that only by immense expenditures can an unknown candidate compete. This may be correct for some candidates, in some situations. But it also is true that at other times a newcomer has achieved political momentum without large contributions. In a broad sense, the statute may favor relative newcomers, by limiting the access of incumbents to large donations." Ct. App. Op. 1541.

Such a state of proof does not rise to the dignity of an unconstitutional discrimination. Professor Freund's analysis is apposite:

> "Turning to a limit on expenditures, the claim is made that a candidate should have the liberty to attract all the material support he can and allocate it as he deems best. . . .
>
> "Much is argued about the favor that would be bestowed upon a competitor as against an incumbent. It seems to me very problematic which would be helped, and in that event there is no serious problem. The incumbent may be helped by a limitation on expenditures since he is better known and needs less exposure. On the other hand, a limit on expenditures may encourage entry into the field by competitors, and in that situation you have a standoff, certainly not so clearly a situation of favoritism bestowed by law as would call for the invocation of a constitutional prohibition." [168]

3. *Appellants Have Failed To Prove That the Expenditure Ceilings Discriminate Against Independents or Single-State Political Parties*

Appellant McCarthy makes a further argument: that these statutes discriminate against independents by per-

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[168] Freund, *supra* note 31, at 73.

mitting national or state party committees to spend additional amounts not charged against a candidate's ceiling (18 U.S.C. § 608(b))—a provision from which only a party-sponsored candidate can benefit. Appellant Conservative Party of New York also complains that since it does not have a national committee it cannot gain the advantage of the expenditures allowed national committees. Appellants' Br. 104-06. Again, appellants' grievances are aimed at the facts of political life and not at any aspect of the challenged statutes.

A candidate nominated by a party—major or minor—obtains advantages but also bears extra burdens. He obtains the party's support, financial and otherwise, but loses some of his freedom to stake out his own positions and usually obliges himself to support the party's other candidates. In short, "the political party and the independent candidate approaches to political activity are entirely different. . . ." *Storer* v. *Brown*, 415 U.S. 724, 745 (1974). Appellant McCarthy readily admits that the group supporting his candidacy, appellant Committee for a Constitutional Presidency—McCarthy '76, chose not to organize as a political party in order to dramatize the differences between party-nominated and independent candidates; he considers his independent status an "important asset" in his "appeal." [169] Appellant Conservative Party has chosen to confine its activities to one state.

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[169] Appellants' Br. 105; *see* McCarthy Deposition Tr. at 66-67; Monroe Affidavit, ¶ 7.

McCarthy nevertheless qualifies as the candidate of a "party" for purposes of receiving public financing for his candidacy. *See* p. 224, *infra*.

By permitting a party committee to spend money to support its candidates, the challenged statutes merely allow parties to continue to perform one of their traditional functions. To provide otherwise would be to outlaw, in part, "the political party . . . [approach] to political activity." Instead, the statutes leave to each candidate the decision whether to seek a party nomination, and to each party the decision to organize as it chooses. Appellant McCarthy, who has sought and received party nominations in the past, is free to seek them in the future if he decides that the benefits outweigh the disadvantages. Appellant Conservative Party can expand geographically if it chooses.

Appellant McCarthy also complains that the expenditure ceiling harms him because it "prevents independent candidates from spending as much as party-sponsored candidates," apparently with reference to the prenomination period, while he is gaining access to the ballot as an independent.[170] We believe that appellants have misread the challenged legislation. The legislative history makes it clear that McCarthy, as an independent, will be allowed to spend $10 million (plus the fund-raising allowance) during the period before the primary elections of the major parties. *See* Appendix A at 3a-4a. And in a virtually indistinguishable case, the FEC has already ruled that a party candidate can spend up to the primary election ceiling even if he is unopposed in the primary.[171]

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[170] Appellants' Br. 104. *See* McCarthy Affidavit, ¶ 17; Monroe Affidavit, ¶ 12; McCarthy Deposition Tr. at 86-88.

[171] FEC AO 1975-9, 40 Fed. Reg. 36242 (Aug. 19, 1975). In any case, particularly since the specific issue presented by McCarthy is presently before the FEC in the posture of a request for an advisory opinion, AOR 1975-53, 40 Fed. Reg. 40678-79 (Sept. 3, 1975), we believe a ruling by this Court would be premature.

In summary, the recent election statistics do not support appellants' claims of unconstitutional discrimination. Nothing else in the record does so. In their attack on the face of the statutes before the laws have operated in even one regular election year, appellants are obligated to present convincing evidence that the statutes will inevitably have the effects they allege. They have presented no such evidence, and their claims of discrimination fail utterly for lack of proof.

C. The Independent Expenditure Limit Is a Reasonable Means To Prevent Evasion of Giving and Spending Limits

Section 608(b) limits to $1,000 the contributions a person may make to a candidate in a federal election. Section 608(e) imposes an identical limit on any expenditure by a person "relative to a clearly identified candidate during a calendar year . . . advocating the election or defeat of such candidate." The statute narrowly defines the words "clearly identified." 18 U.S.C. § 608(e)(2)(A).

Thus, in an election for federal office, an individual may give up to $1,000 to any candidate and may also make "independent expenditures" up to the same limit to promote the candidate's cause or to defeat his opponent. In addition, he may incur entertainment or travel expenses to the same end, the first $500 of each of which are not treated as an "expenditure." 18 U.S.C. § 591(f).

As the court of appeals recognized, the limit on independent expenditures is necessary to eliminate an obvious means of evading the limit on contributions. Ct. App. Op. 1530. Congress was concerned that wealthy individuals might spend vast sums of money for satellite

campaigns, formally unconnected to a candidate's campaign but supportive of it all the same:

> "[S]uch controls are imperative if Congress is to enact meaningful limits on direct contributions. Otherwise, wealthy individuals limited to a [$1,000] direct contribution could also purchase one hundred thousand dollars' worth of advertisements for a favored candidate. Such a loophole would render direct contribution limits virtually meaningless." [172]

Obviously, such spending would also frustrate the limits on expenditures by candidates.

This congressional concern finds ample basis in the history of evasion of prior campaign finance laws. Giving and spending limits are not new to the 1974 legislation. They have been on federal statute books since 1940. Amendments to the Hatch Act in that year imposed a $5,000 limit on contributions to any interstate campaign committee and a $3 million ceiling on the receipts and expenditures of such a committee.[173] Both of those limits were ingeniously evaded and became dead letters. The 1940 law was read by political fund-raisers and their counsel as merely limiting contributions to a single committee, and as containing nothing to prevent multiple gifts to multiple committees even when the multiple com-

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[172] S. Rep. No. 689, *supra* note 35, at 71. This is a judgment that Congress has repeatedly and consistently emphasized. *See* H.R. Rep. No. 1239, *supra* note 56, at 6-7, 17, 51; S. Rep. No. 310, 93d Cong., 1st Sess. 12-13, 43 (1973); S. Rep. No. 1237, 93d Cong., 2d Sess. 4, 56-57 (1974) (Conference Report); H.R. Rep. No. 1438, 93d Cong., 2d Sess. 4, 56-57 (1974) (Conference Report); 119 Cong. Rec. S 14636, 14857-58 (1973) (consideration of provision comparable to § 608(e) in earlier version of Senate bill).

[173] Act of July, 1940, 54 Stat. 767-72, enacting Hatch Act §§ 13, 20.

mittees were under common control.[174] Also, it was read as inapplicable to committees operating within a single state. Campaign solicitors and contributors showed no reluctance to exploit these loopholes, proving the statute to be, in President Johnson's phrase, "more loophole than law." *See* Ct. App. Op. 1530.

An even more direct antecedent exists in the history of Section 610, which until 1947 prohibited only corporate and union "contributions." That word was construed to include only direct gifts or payments to—not expenditures independent of—a candidate's formal campaign. The result was massive evasion, as the district court found. Findings I, ¶ 136, IIA J.A. 190. The experience is recounted in detail in Mr. Justice Frankfurter's opinion for the Court in *United States* v. *UAW*, 352 U.S. 567, 570-84 (1957).

After the 1944 elections, Congress investigated the evasion of Section 610 and concluded that the term "contribution" had been wrongly interpreted to exclude expenditures. H.R. Rep. No. 2739, 79th Cong., 2d Sess. 40, 46 (1946). It amended the statute in Section 304 of the Taft-Hartley Act to correct the error. Senator Taft explained the purpose of the amendment:

> "[T]he words of [Section 610] have been somewhat changed in effect so as to plug up a loophole which obviously developed, and which, if the courts had permitted advantage to be taken of it, as a matter of fact, would absolutely have destroyed the prohibition against political advertising by corporations. If

[174] This reading may have been incorrect, *see Common Cause* v. *Democratic Nat'l Comm.*, 333 F. Supp. 803 (D.D.C. 1971); *Common Cause* v. *Finance Comm. to Re-Elect the President*, Civil No. 1780-72 (D.D.C. 1973), but it was never challenged by the Department of Justice.

> 'contribution' does not mean 'expenditure,' then a candidate for office could have his corporation friends publish an advertisement for him in the newspapers every day for a month before election. I do not think the law contemplated such a thing, but it was claimed that it did, at least when it applied to labor organizations." 93 Cong. Rec. 6439 (1947).

This Court has recognized the force of that logic. It has said that "it was obvious that the statute as construed [before 1947] could easily be circumvented through indirect contributions." *United States* v. *CIO*, 335 U.S. 106, 115 (1948). *See also United States* v. *UAW*, *supra*. The Court construed Section 610, as amended, to leave corporations and unions free to spend money to communicate with their stockholders and members. *United States* v. *CIO*, 335 U.S. at 121-24. However, it has never cast doubt on either the need for or the constitutionality of prohibiting other corporate and union expenditures designed to influence federal elections. *See Pipefitters Union* v. *United States*, 407 U.S. 385 (1972).

The independent expenditure limit in Section 608 is not a total prohibition but a ceiling permitting expenditures up to $1,000 per candidate; and it limits only the spending of money, leaving individuals free to express their views in any forum at any time.[175] Moreover, independent expenditures for or against candidates are not a traditional means of political expression; their

[175] *Compare Civil Service Comm'n* v. *Letter Carriers*, 413 U.S. 548, 576-77 (1973). *See* Findings I, ¶ 5 IIA J.A. 6-8, for a list of activities that the district court found available to a citizen wishing to participate in and affect the political process; the vast majority of these activities involve little or no expenditure of money.

amount has been almost negligible.[176] As the history of Section 610 reveals, if such expenditures increase, the increase will almost certainly be because they offer a means to circumvent the other limits.

In writing Section 608(e), Congress conscientiously followed the guidance furnished by the courts in invalidating an earlier provision aimed at the circumvention problem. Title I of the FECA as enacted in 1971 imposed limits on spending in the communications media by candidates for federal office. In order to prevent evasion of those limits through "independent" media expenditures in favor of candidates, the Act forbade a newspaper or broadcast station to publish any paid advertisement for or against a candidate unless the candidate certified in writing that the expense would not cause him to exceed his statutory limit.[177] The effect was to charge every "independent expenditure" against

[176] Only 21 individuals reported independent expenditures with respect to the 1972 presidential election, totaling $98,060. Only 13 individuals and one group reported independent expenditures with respect to the 1974 congressional elections, totaling $15,802. Findings IIA, ¶¶ 112, 113, IIB J.A. 472. (Section 305 of the FECA required reporting of independent expenditures over $100.) These figures compare with total spending of $94 million by candidates who ran in the 1972 presidential general election and $74 million by candidates who ran in the 1974 congressional general elections. Findings IIA, ¶¶ 11, 51, IIB J.A. 441, 451.

Reports filed by Appellant Mott in 1972 indicate that he made expenditures totaling $53,370.75. The reports indicate that at most one-third represented expenditures made to publicize his views about a clearly identified candidate. Those payments were made to a New York advertising agency. It is not clear whether they were made independently of the candidate he supported. *See* Findings III, Mott ¶ 15, IIB J.A. 724. In 1974, Mr. Mott reported $10,350 in expenditures. Of that amount, only $177 was spent for public dissemination of Mr. Mott's views—the typing of fund-raising letters for one Senate candidate.

[177] *See* Federal Election Campaign Act of 1971, Pub. L. 92-225, 86 Stat. 3, § 104(b), (c), repealed by Pub. L. 93-443, 88 Stat. 1278, § 205(b).

the candidate's ceiling, and to give the candidate a virtual veto power over everything said in his favor or against his opponent in a paid advertisement. Furthermore, the scheme was enforceable by penalties *against the communications media* for unauthorized publications.

That enforcement scheme was held by a three-judge district court to be an unconstitutional prior restraint on the press. *ACLU, Inc.* v. *Jennings*, 366 F. Supp. 1041 (D.D.C. 1973), *dismissed as moot*, 43 U.S.L.W. 5043 (1975). The district court observed that the candidate expenditure ceilings themselves were "presumably valid," *id.* at 1050, and that Title I's "constitutional infirmities —its prior restraints and criminal sanctions directed to the press—[are] inherent in the enforcement structure that it creates." *Id.* at 1054. The Court also noted that "[t]he aims of the Act [are] clearly of prime national concern." *Id.* Congress responded by repealing Title I and substituting the contribution and independent expenditure limits here under review.[178]

The present law is free of its predecessor's flaws. An individual may contribute directly to a candidate, incur independent expenses in the candidate's support, or both. In each case, he is subject only to a statutory maximum amount. No candidate has control over what may be said about him or his opponent by others, and no restrictions or prohibitions run against the communications media. Congress has seen the defects of its previous approach and manifestly found a better way, guided by

[178] In 1973, the Senate passed a bill requiring candidate approval of all independent expenditures (over $1,000) in the same manner that the 1971 law required approval of media expenditures. *See* 119 Cong. Rec. S 26481-87 (1973); *id.* S 26594-622 (1973). The *Jennings* decision intervened and in the next session Congress changed its approach by passing the challenged statutes.

the decision in *Jennings*. *See* S. Rep. No. 689, *supra* note 35, at 18-19.[179]

As the court of appeals stressed,[180] Section 608(e) is carefully delimited to cover only expenditures that would be direct evasions of the contribution limits. Only expenditures "advocating the election or defeat" of a "clearly identified candidate" are subject to the monetary limit. "Clearly identified" is explicitly and narrowly defined. 18 U.S.C. § 608(e)(2)(A). Funds spent to propagate one's views on issues without expressly calling for a candidate's election or defeat are thus not covered.

The boundaries of Section 608(e) are not so vague that groups and individuals will have to guess as to the statute's reach. Nor is the likelihood of discriminatory enforcement which appellants foresee (Br. 114-15) more than speculation. In determining the scope of permissible federal regulation, the courts have had no trouble distinguishing between discussions of general political issues and partisan electoral campaigning. *See, e.g., ACLU, Inc.* v. *Jennings, supra; United States* v. *National Committee for Impeachment*, 469 F.2d 1135 (2d Cir. 1972); *United States* v. *CIO*, 335 U.S. 106 (1948); *Pipefitters Union* v. *United States*, 407 U.S. 385 (1972); *Civil Service Commission* v. *Letter Carriers*, 413 U.S. 548 (1973).

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[179] Appellants quote Professor Bickel as saying that a provision such as Section 608(e) is "flatly unconstitutional." Appellants' Br. 112. Professor Bickel said no such thing. The quoted remark refers to a provision, like old Title I of the FECA, designed "to put the candidate in control, make him accountable for, and allow him to control, the expenditures that are made in his behalf." Bickel, *supra* note 31, at 65-66. Professor Bickel went on to say that a law limiting contributions would be "both wise and lawful," but did not express any view on an independent expenditure limit such as Section 608(e). *Id.*

[180] Ct. App. Op. 1530-31.

Other sections of the challenged statutes further help to avoid any problem of vagueness or overbreadth in Section 608(e).[181] If any such problems nevertheless arise, the FEC can eliminate them by rule or advisory opinion. 2 U.S.C. §§ 437d, 437f.[182]

Much of appellants' criticism relates to the fact that the $1,000 limit would not permit a person to buy a quarter-page ad in The New York Times or The Washington Post urging a candidate's election. They suggest that the most difficult constitutional questions would arise if the section were applied to advertisements containing the purchaser's own speech. Appellants' Br. 107. Of course, an individual could buy an ad costing $10,000 if it promoted 10 or more candidates. H.R. Rep. No. 1239, *supra* note 56, at 7. It is also possible that a number of persons who do not otherwise act in concert for political purposes could pool their independent expenditures on a single occasion to buy an advertisement, without becoming a "group" or "political committee" subject to a single $1,000 limit. The FEC has so suggested in its recent proposed disclosure regulations.[183]

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[181] For example, "expenditure" excludes "any news story, commentary, or editorial" distributed through the media, "nonpartisan activity designed to encourage individuals to register to vote or to vote," and any communication by a membership organization or corporation to its members or stockholders. 18 U.S.C. § 591(f)(4)(A), (B), (C).

[182] The FEC's pending rulemaking proceeding will address, *inter alia*, questions as to "the scope of activities covered" by Section 608(e). 40 Fed. Reg. 23888, Item II-E (June 2, 1975).

[183] "The term 'political committee' does not include a group of individuals who act in concert for the purpose of making a single expenditure in a single transaction so long as the funds expended are the personal funds of the individuals concerned, the transaction does not involve any ongoing solicitation effort, the members do not continue to act in concert for the purpose of influencing a Federal election subsequent to the completion

But the Court need not decide such hypothetical questions now. There will be time to consider them if they are ever presented in a specific factual situation. The Court should uphold the constitutionality of Section 608 (e) on its face for the above reasons and for the addition reasons eloquently stated in the Brief for *Amici Curiae* Senators Scott and Kennedy at 54-63.

VI. APPELLANTS HAVE FAILED TO PROVE THAT THE CHALLENGED DISCLOSURE PROVISIONS UNCONSTITUTIONALLY RESTRICT THEIR RIGHTS OF FREE SPEECH, ASSOCIATION, OR PRIVACY

Appellants concede that Congress may constitutionally require disclosure of campaign contributions and expenditures, at least in certain circumstances. Appellants' Br. 170-71.[184] Indeed, appellants urge the Court to rule that disclosure laws satisfactory to them are not only a panacea for all abuses that plague campaign finance, but virtually the sole remedy Congress can constitutionally prescribe. *Id.* Appellants, however, ask the Court to invalidate these disclosure provisions because of the particular monetary thresholds chosen by Congress,[185] and because these thresholds apply to minor party and independent candidates.

In our view, the challenged disclosure provisions serve compelling governmental interests and are not unconstitutionally overbroad in their application.

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of the transaction, and the expenditure is not authorized by any candidate." FEC Notice 1975-51, § 100.14, 40 Fed. Reg. 44700-01 (Sept. 29, 1975).

[184] Appellants apparently do not challenge the requirement that political committees keep records of and report certain of their expenditures. 2 U.S.C. §§ 432(c)(3)-(4), 434(b)(9)-(11).

[185] Appellants apparently prefer a threshold of $397. Appellants' Br. 185.

A. Disclosure Serves a Compelling Public Need and Promotes First Amendment Values

1. *Disclosure Deters Political Corruption and Reduces the Appearance of Such Corruption*

Congress was aware that pernicious abuses associated with campaign financing have plagued the electoral process. Corruption of public officers—and the appearance of such corruption—have seriously weakened public confidence in the integrity of the Government. There can be little doubt that Congress and the district court correctly concluded that secrecy in campaign contributions and expenditures fosters these abuses. Findings I, ¶ 135, IIA J.A. 190.

The following testimony before the Senate about the execution of an illegal corporate contribution depicts the predilection for secrecy:

> "Mr. Dash. Were you told anything concerning whether or not that date, April 6, was relevant, why the contribution had to be made then?
>
> "Mr. Clark [of American Shipbuilding Corporation]. Yes; the intent of writing the check on April 6 was because of the disclosure law going into effect on April 7.
>
> "Mr. Dash. So that having given the contribution on April 6 would mean that it did not have to be disclosed?
>
> "Mr. Clark. Yes." [186]

An official of Ashland Oil gave similar testimony concerning his company's illegal $100,000 corporate contribution:

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[186] *Hearings Before the Senate Select Comm., supra* note 41, at 5405. On April 5 and 6, 1972, the Finance Committee to Re-elect the President received contributions of more than $5.2 million. Affidavit of John J. Conway, *supra* note 44, ¶ 29.

"Mr. Hamilton. Did Mr. Stans suggest to you that the money be contributed before the 7th day of April 1972?

"Mr. Atkins. Yes, sir.

"Mr. Hamilton. And what was the reason for that suggestion that Mr. Stans gave you?

"Mr. Atkins. Contributions prior to that date were supposed to be secret and not disclosed.

"Mr. Hamilton. Whose anonymity was Mr. Stans attempting to protect?

"Mr. Atkins. Well, again I am not sure whose anonymity Mr. Stans was attempting to protect, I was interested in protecting my company and myself." [187]

Furthermore, the district court has found that persons who contribute, solicit, receive, and expend campaign contributions with improper motives have preferred to do so secretly; that a substantial percentage of the illegal corporate campaign contributions described in Part III, *supra*, were made prior to April 7, 1972, the effective date of the disclosure provisions of the FECA in 1971; and that a substantial number of the largest contributions from individuals as well as organizations were made prior to April 7.[188]

Secrecy encourages impropriety not only in the raising of campaign contributions, but also in campaign spending. Donors wishing to conceal their identity often make their contributions in cash. The Senate Select Committee

[187] *Hearings Before the Senate Select Comm., supra* note 41, at 5441; *see id.* at 5336, 5448.

[188] Findings I, ¶¶ 126, 127, 146, IIA J.A. 156, 203; *see id.* I, ¶ 14, IIA J.A. 203-05; *id.* IIA, ¶ 119, IIA J.A. 508; *Final Report, supra* note 38, at 445.

on Presidential Campaign Activities found that the "Watergate break-in" and certain campaign "dirty tricks" undertaken by Donald Segretti were funded entirely by such secret campaign contributions.[189] Only secret campaign contributions were used to finance the "Watergate coverup conspiracy." [190] A secret $5,000 contribution to the Nixon campaign was diverted by a member of the White House staff to pay for the illegal entry into the offices of Daniel Ellsberg's psychiatrist.[191] Fifty thousand dollars in secret cash contributions were used falsely and illegally to inflate the proceeds of a campaign dinner.[192]

In view of the nexus between secrecy and campaign corruption, the congressional conclusion that disclosure is a reasonable means of achieving reform can hardly be assailed. In the famous phrase of Mr. Justice Brandeis,

> "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." Other People's Money 92 (1914).

Campaign contribution disclosure laws are hardly new. This Court has long since upheld them:

> "Congress reached the conclusion that public disclosure of political contributions, together with the names of contributors and other details, would tend

[189] *Hearings Before the Senate Select Comm., supra* note 41, at 538-39, 573-74, 699-701, 757-59, 761, 2094; *Final Report, supra* note 38, at 25-26, 161; Findings I, ¶ 128, IIA J.A. 508.

[190] *Hearings Before the Senate Select Comm., supra* note 41, at 546-48, 702-03, 712-13, 717, 767-68, 2095-96, 2100, 2108-09, 2295-97.

[191] *Final Report, supra* note 38, at 694-99.

[192] *Hearings Before the Senate Select Comm., supra* note 41, at 757.

to prevent the corrupt use of money to affect elections. The verity of this conclusion reasonably cannot be denied." *Burroughs* v. *United States*, 290 U.S. 534, 548 (1934).

Disclosure has many beneficial effects. As the district court found, disclosure will deter illegal contributions and other contributions considered corrupt by the community. Findings I, ¶¶ 125, 135, IIA J.A. 156, 190.[193] Public officials will shrink from affording special benefits to campaign contributors where the electorate knows or has the means of obtaining information about the contributor's largesse. Disclosure also helps in enforcing related laws frequently violated during the conduct of political campaigns. As the district court found, discovery of the persons responsible for the Watergate break-in was facilitated by tracing the campaign contributions used to finance the operation. Findings I, ¶ 128, IIA J.A. 156; *see* Ct. App. Op. 1544-45. Judicially compelled disclosure of previously secret lists of pre-April 7, 1972 campaign contributions enormously facilitated the investigations of the Watergate Special Prosecution Force and resulted in a large number of guilty pleas and convictions for making and seeking illegal contributions. Watergate Special Prosecution Force Report 71-72 (Oct., 1975). The record-keeping and disclosure provisions are also essential to the enforcement of many other parts of the challenged statutes. It would be impossible to determine whether committees, candidates, and contributors were adhering to other provisions of these statutes without the requirement that records of certain receipts and expenditures be maintained and reported periodically.

[193] Disclosure alone, however, is not sufficient to achieve these results. *See* pp. 103-05, *supra*.

2. *Disclosure Promotes First Amendment Values by Informing the Electorate*

The periodic pre-election reporting of campaign contributions and expenditures prescribed by these laws assists voters to make informed assessments of candidates *before* they vote. Thus, as the district court found, disclosure of the sources of campaign contributions improves some voters' ability to evaluate the candidates. Findings I, ¶ 134, IIA J.A. 190. By improving the flow of information to the electorate, disclosure provisions facilitate the intelligent exercise of the foremost among constitutional freedoms—the right to vote—and thereby promote one of the central purposes of the First Amendment.[194] More broadly, informed public opinion is a precondition to effective citizen participation in and control of government. As Mr. Justice Stewart has observed, "an informed and critical public opinion . . . alone can . . . protect the values of democratic government."[195] The dissemination of campaign finance information—which is indisputably relevant to the conduct of public affairs—thus nourishes the cardinal First Amendment goal of "producing an informed public capable of conducting its own affairs." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 392 (1969). Hence, disclosure sustains active, alert, and responsible citizenship. *See United States* v. *UAW*, 352 U.S. 567, 575 (1957).

This Court has recognized the informational value of exposing to public scrutiny the expenditures of political advocates. It has upheld against First Amendment at-

[194] Brennan, *The Meiklejohn Interpretation of the First Amendment*, 79 Harv. L. Rev. 1, 13 (1965); *see* Ct. App. Op. 1544-45.

[195] *New York Times Co.* v. *United States*, 403 U.S. 713, 728 (1971) (concurring opinion); *see* T. Emerson, Toward a General Theory of the First Amendment 7-8 (1966).

tack a disclosure statute much like the FECA—the Federal Regulation of Lobbying Act. *United States* v. *Harriss*, 347 U.S. 612 (1954). The Court reasoned that the American ideal of government by elected representatives depends on the representatives' ability to evaluate competing choices, and that information about the employers of lobbyists helps Congress properly evaluate the positions they advance. *Id.* at 625. The American ideal of government no less depends on the electorate's ability to evaluate candidates who seek to represent them, and such information is no less valuable in helping the public make its choices. *See Burroughs, supra.*

3. *Disclosure Promotes First Amendment Values by Assisting the Press to Perform Its Constitutional Role*

The disclosure requirements assist the press in performing its vital First Amendment functions—the "organized, expert scrutiny of government," and the dissemination of information to the public about its government.[196] The press plays an indispensable role in fostering the flow of information critical to maintaining an informed public. "[N]ewspapers . . . have shed and continue to shed, more light on the public . . . affairs of the nation than any other instrumentality of publicity. . . ." *Grosjean* v. *American Press Co.*, 297 U.S. 233, 250 (1936). In particular, the press plays a crucial and unique role in exposing government misconduct. As Mr. Justice Black has said, "Only a free and unrestrained press can effectively expose deception in government." [197]

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[196] "Or of the Press," Address of Potter Stewart, *supra* p. 93.

[197] *New York Times Co.* v. *United States*, 403 U.S. 713, 717 (1971) (concurring opinion).

The press has applied its "expert scrutiny" to campaign finance disclosure reports with salutary results. The Secretary of State of Florida has said about the Florida disclosure statute:

> "I do not wish to exaggerate, but I frequently had to shove reporters out of the way before I could get the papers [campaign treasurer's pre-election report] filed . . . because they [the reporters] would grab them. . . ." [198]

B. Even If the Disclosure Provisions Had Some Incidental Effect on First Amendment Rights, They Would Nevertheless Be a Constitutional Exercise of Congress' Power To Regulate in This Area

We fully recognize the scope of First Amendment protection of freedom of association for the advancement of beliefs and ideas. We do not gainsay that, at least in theory, the requirement of public disclosure of associations may dampen an individual's freedom to associate and to express his views through organizational ties.

However, as discussed more fully in Part IV, *supra*, this Court has recognized that a process of constitutional accommodation is necessary and appropriate where—as here—countervailing interests compete with First Amendment values. The need for accommodation is acutely present here because important First Amendment values lie on both sides of the issue.

Judicial decisions involving similar laws have uniformly upheld their constitutionality. In *Burroughs* v. *United States*, 290 U.S. 534 (1934), this Court upheld in sweeping terms the similar disclosure provisions of

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[198] Roady, *Ten Years of Florida's "Who Gave It—Who Got It" Law*, 27 Law & Contemp. Prob. 434, 438-39 (1962).

the Federal Corrupt Practices Act of 1925. The Court in *Burroughs* did not have occasion to address First Amendment questions. The Court's reasoning, however, foreshadowed First Amendment analysis, for the Court first identified the compelling public need for the legislation and then concluded that disclosure was an appropriate means of achieving that end. *See Stoner* v. *Fortson*, 379 F. Supp. 704, 713-14 (N.D. Ga. 1974) (three-judge court). In any case, *Burroughs* at the very least forecloses further dispute about the need for and utility of legislation requiring the disclosure of campaign financing data. *Pichler* v. *Jennings*, 347 F. Supp. 1061, 1068 (S.D.N.Y. 1972).

When the Court upheld the Federal Regulation of Lobbying Act against First Amendment attack in *United States* v. *Harriss*, 347 U.S. 612 (1954), it relied on and approved *Burroughs*:

> "Toward that end, Congress has . . . merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose. It wants only to know who is being hired, who is putting up the money, and how much. It acted in the same spirit and for a similar purpose in passing the Federal Corrupt Practices Act—to maintain the integrity of a basic governmental process." *Id.* at 625.[199]

In *Harriss*, the Court rejected the argument that disclosure will deter political activity, in terms equally applicable to appellants' contentions in this case:

[199] *See Communist Party* v. *Subversive Activities Control Bd.*, 367 U.S. 1, 97-99 (1961); *id.* at 173-74 (Douglas J., dissenting: "Criminal sanctions for failure to report and to disclose all contributions made to political parties are permitted," *citing Burroughs*).

> "But, even assuming some such deterrent effect, the restraint is at most an indirect one resulting from self-censorship, comparable in many ways to the restraint resulting from criminal libel laws. The hazard of such restraint is too remote to require striking down a statute which on its face is otherwise plainly within the area of congressional power and is designed to safeguard a vital national interest." *Id.* at 626 (footnote omitted).[200]

The lower courts have consistently upheld the constitutionality of campaign finance disclosure statutes. Ct. App. Op. 1541-49; *United States* v. *Finance Committee to Re-Elect the President*, 507 F.2d 1194, 1200 (D.C. Cir. 1974) (upholding the similar original FECA disclosure provisions: "We reject the attack on this statute on First Amendment grounds on the present record—in the context of *Burroughs & Cannon* and *Harriss*, and in the absence of a foundation in fact, as contrasted with speculation"); *Stoner* v. *Fortson*, 379 F. Supp. 704, 713 (N.D. Ga. 1974) (three-judge court) (upholding Georgia disclosure statute: "This court has no doubt that the disclosures sought bear a substantial connection to preventing corruption in politics, to preventing influence buying, to preventing favoritism in dealings with the state, to preventing the buying of appointments and positions; in short, to preserving the democratic system and ensuring fair elections"); *see Pichler* v. *Jennings*, *supra*.

[200] This Court has sustained a variety of other disclosure requirements against First Amendment attacks. In *Lewis Publishing Co.* v. *Morgan*, 229 U.S. 288 (1913), it upheld a statute requiring newspapers using the mails to publish certain information about their management and ownership. In *Viereck* v. *United States*, 318 U.S. 236 (1943), the disclosure provisions of the Foreign Agents Registration Act withstood attack. *See also id.* at 251 (Black, J., dissenting); *Communist Party* v. *Subversive Activities Control Bd.*, *supra* note 199; *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63 (1928).

These cases would establish the facial validity of the challenged disclosure provisions even if appellants had shown some modicum of harassment or "chilling effect." On the present record they are conclusive, for appellants have utterly failed to establish a factual foundation for their claim of "chilling effect." Ct. App. Op. 1546. In this Court, instead of urging the same factual claims rejected below, appellants now offer only "clearly articulated fears"—carefully phrased in the subjunctive—as to the effect the statute "can," "would," or "might" have. Appellants' Br. 172-73, 178.

Appellants seek to justify their failure of proof by stressing the evanescent quality of evidence of harassment or deterrence. By so doing, they ask in effect for a rule of *per se* unconstitutionality wherever disclosure of association is required. Adoption of any such *per se* rule would radically conflict with this Court's wise and cautious development of the law on disclosure, *Burroughs, supra; NAACP* v. *Alabama*, 357 U.S. 449 (1958), and with First Amendment doctrine in general, *see e.g., Near* v. *Minnesota*, 283 U.S. 697 (1931); *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969).

On the present record, *NAACP* v. *Alabama, supra*, and related cases are inapposite.[201] In *NAACP*, there was a proven threat of direct and immediate retaliation.[202] As the court of appeals said:

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[201] *See Stoner, supra; United States* v. *Finance Comm., supra; Cox, supra* note 31, at 69; *Freund, supra* note 31, at 74.

[202] *NAACP* v. *Alabama*, 357 U.S. at 462: "Petitioner has made an *uncontroverted showing* that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." (emphasis added); *Bates* v. *City of Little Rock*, 361 U.S. 516 (1960); *see Talley* v. *California*, 362 U.S. 60 (1963).

Similarly inapposite are those cases (1) where the state had advanced no compelling interest for the required disclosure: *Gibson* v. *Florida Legislative Comm.*, 372 U.S. 539, 557 (1963); *NAACP* v. *Button*, 371 U.S. 415, 444 (1963); *Talley* v. *California*, 362 U.S. at 63; or (2) where there was no rational nexus between achievement of the state's interest and disclosure of the information: *Bates* v. *City of Little Rock*, 361 U.S. at 525; *Shelton* v. *Tucker*, 364 U.S. 479 (1960). These problems neither inhere in nor result from the challenged disclosure provisions.

> "It may well be that a party (or candidate) can demonstrate such harassment to itself or to its supporters as to underpin a ruling that disclosure in particular circumstances cannot constitutionally be required. *Compare NAACP* v. *Alabama* .... Whether the Commission through its regulations or its advisory opinions can appropriately address this situation is a question we do not decide in the absence of concrete facts. In any event, courts sit to act in such cases when presented with a proper record." Ct. App. Op. 1548.

We accept Judge Bazelon's statement below that "[t]he Court has never varied the rigor of its scrutiny depending on the presence or absence of a record of harassment and chill." Ct. App. Op. 1596 (footnote omitted); Appellants' Br. 177. We agree that "compelling interest" scrutiny is appropriate.[203] But this Court has never given the mere incantation of the word "chill" a talismanic effect, and should not do so here. The court of appeals properly considered the virtual absence of proof in the record in applying the compelling interest test.

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[203] We do urge, however, that a component of that test in the associational disclosure cases has always been the degree of harm actually suffered as a result of the challenged disclosure of associational ties.

C. The Threshold Amounts for Disclosure Are Not Unconstitutionally Overbroad

Appellants attack the disclosure provisions on the theory that the disclosure of some contributions greater than $100 but less than some unidentified amount is unnecessary to deter political corruption. Appellants' Br. 184-89.[204] Appellants further suggest that these threshold levels are arbitrary because they are not calibrated for different elective offices. *Id.* at 188-89. Apparently, appellants contend that Congress was constitutionally required to legislate an assumption that Representatives can be improperly influenced more cheaply than Senators, and Senators more cheaply than Presidents.

In focusing solely on the anti-corruption values served by disclosure, appellants wholly ignore the informational role disclosure plays. Apart from the significance of a contribution in excess of $100 by itself, the disclosure of many such contributions from common or related sources can identify the nature of a candidate's financial "constituency." The possibility that such pooling can produce significant aggregate contributions is illustrated by the reports of one Senator, which disclosed that he had received on one day 247 individual contributions from one corporation's employees—totalling $28,025—for his reelection campaign.[205]

Appellants' theory that the thresholds require disclosure of contributions too low to have any relation to

[204] The United States *Amicus* Brief (at 86-87) incorrectly states that disclosure is required for contributions of $100. In fact, disclosure is required only for contributions "in excess of $100." 2 U.S.C. § 434(b)(2).

[205] *See* Reports of Receipts and Expenditures filed with the Secretary of the Senate for the period April 7, 1972 through May 30, 1972 by Senator Robert Griffin and political committees supporting him.

public corruption has been rejected by the courts. In *Stoner* v. *Fortson*, *supra*, the three-judge court recognized that:

> "[A] cut-off point had to be established somewhere. . . . This court views the $101 or more threshold as a rational attempt . . . to establish a level of contribution that will attract the attention of the candidate and thus begin to satisfy the goals of the statute." 379 F. Supp. at 712-3 (citations omitted).[206]

Appellants present no new factual basis for this Court to hold that the threshold chosen by Congress is so unreasonable as to be unconstitutional. In *United States* v. *Finance Committee*, *supra*, the court rejected an argument similar to appellants' in precisely these circumstances:

> "Appellant says the allowance of secrecy only to gifts of $100 and under would chill many campaign gifts [that] present no conceivable menace to the integrity of the electoral process, presumably those over $100 and under some other unknown figure. In the absence of data, we are in no position to make a merely speculative determination as to the degree of chill to be expected from publicity on donations of any particular amount, nor as to how large a gift is necessary to undermine the integrity of a candidate. The $100 figure is, it would appear, high enough for a political campaign to enjoy substantial financial support from secret gifts alone." 507 F.2d at 1200.

[206] The court in *Stoner* supported its conclusion by reference to the thresholds of the FECA of 1971 (in excess of $100) and FCPA of 1925 ($100), and to court rules that require federal judges to disclose gifts over $100. *Id.* at 712-13. It is noteworthy that Congress chose to permit tax deductions for political contributions up to $100. 26 U.S.C. § 218(b).

Congress' factual and practical judgment in deciding where the line should be drawn is entitled to great respect. *Burroughs* v. *United States*, *supra*, 290 U.S. at 548; *United States* v. *Finance Committee*, *supra*, 507 F.2d at 1200; *Stoner* v. *Fortson*, *supra*, 379 F. Supp. at 712-13; *see Pell* v. *Procunier*, 417 U.S. 817, 827 (1974). As was said in upholding the $100 disclosure threshold in *Burroughs*:

> "If it can be seen that the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted and the end to be obtained, are matters for congressional determination alone." 290 U.S. at 547-48.

D. The Disclosure Provisions Are Not Unconstitutionally Overbroad as Applied to Minor Party and Independent Candidates

Appellants contend that the challenged disclosure provisions are unconstitutionally overbroad as applied to minor party and independent candidates. Appellants' Br. 178-184. Appellants' premise for this argument is that the "present access" of such candidates to "governmental power is normally remote"—they have little chance of winning elections. *Id.* at 181.

Appellants are again myopic in focusing exclusively on one of the purposes served by disclosure—the prevention of corruption. Minor party and independent candidates—like major party candidates—hold themselves out to the electorate as possible ballot choices. Information about their contributors can be as useful to a voter's assessment of their qualifications as in the case of other candidates, particularly if the minor party or independent

candidate is beholden to political "angels" for financial support. "[T]he voting population has an interest in knowing the composition of the angels' wings, and what makes them fly." Ct. App. Op. 1545 n. 114.[207] There is no constitutional reason why voters should have to assess some candidates in greater darkness than others merely because the one candidate's established following is not yet numerous.

The test for exclusion proposed by appellants (Br. 127-39) (and by Judge Bazelon in partial dissent below (Ct. App. Op. 1593 n. 1)) hinges solely on the size of the candidate's established following. It bears no necessary relation to the alleged constitutional danger of harassment because of the level of controversy the party or candidacy engenders. And indeed it could not, for no such test could be administered legislatively or judicially, even assuming its constitutionality.[208] Yet some parties with limited established followings may not be controversial at all.

Moreover, appellants' proposed exemption of minor party and independent candidates would open a poten-

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[207] Appellants' rejoinder that minor parties generally receive little money and have few large contributors (Br. 182 n. 8) comes oddly from their mouths in view of the emphasis elsewhere in their brief on the alleged reliance of minor parties on large "seed money" contributors. (*Id.* at 130-38.) If minor party and independent candidates do rely so little on large contributions—as is the case (*see* pp. 116-18, *supra*)—appellants' arguments about the alleged unconstitutional effects of contribution limits take on a hollow ring.

[208] *See* Ct. App. Op. 1596 n. 28 (Bazelon, J., concurring and dissenting in part). For example, a political party that is not controversial in Berkeley, California, or Cambridge, Massachusetts, might very well provoke considerable antipathy in Darien, Connecticut, or Cedar Rapids, Iowa. It would be absurd to suggest that the challenged disclosure provisions should apply only in the former locales.

tially disastrous loophole in the law. It would provide a strong incentive for fractionalization of our major parties and wholesale evasion of the challenged statutes. *Storer* v. *Brown*, 415 U.S. 724, 736 (1974). To hypothesize with the same liberty taken by appellants, a very popular candidate for the Republican nomination who is more conservative than President Ford might decide that he cannot secure the nomination and instead might break off from the Republican Party to form a new "More Republican Party" ("MRP"). Since the MRP has little established following, it would be a new party under the statute and under appellants' test. It would—if appellants' arguments are accepted—be permitted to raise and expend funds in total secrecy, and it might raise $1 million each from 30 millionaires. Such secrecy would subvert the enforceability of the statute's other provisions. Indeed, if appellants' full argument —that contribution and expenditure limits should not be applied to minor party and independent candidates—is accepted, the MRP could raise and expend much more than the $36 million limit imposed on other presidential candidates. The result would be a non-fringe party with potential "present access to governmental power" that could operate wholly in disregard of the challenged statutes, and therefore at a great advantage over the major parties.

Similarly, the applicability of the challenged statutes to Governor Wallace's campaign would depend under appellants' theory on whether or not Governor Wallace decides to run as a Democrat—a choice he has not yet made. During any period before or after running as a Democrat, Governor Wallace could amass and spend a campaign war chest unaffected by the campaign finance laws applicable to the activities of other serious

candidates—simply by disassociating himself from the Democratic Party.

These examples suggest the problems inherent in Judge Bazelon's attempt to distinguish *Stoner* v. *Fortson*, 379 F. Supp. 704 (N.D. Ga. 1974), as a case involving a "controversial" major party candidate rather than a "minor party" candidate. Ct. App. Op. 1596 n.28. Surely, the application of First Amendment principles cannot be made to turn on the name of the party under whose banner the controversial candidate chooses to campaign.

Appellants concentrate their argument on the improbability of victory for a minor party or independent candidate. Appellant Buckley and *Amicus Curiae* Longley graphically demonstrate that minor party and independent candidates sometimes win elections. In any event, appellants ignore the very practical effects non-major parties have on the electoral process—even when they do not win. Numerous examples need not be cited to demonstrate the increasing frequency with which third party and independent candidates have played a "balance of power" role in an election, or where a third party candidate has siphoned off sufficient votes to affect the outcome of an election or the candidates' positions on issues [209]—roles whose importance appellants elsewhere stress heavily. Appellants' Br. 120-123.[210] The voters are entitled to know who fuels such campaigns.

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[209] It is the stated intent of appellant Conservative Party of the State of New York to demonstrate its capacity to take votes away from major party candidates in order to influence their policies. Deposition Tr. at 47-51.

[210] The "stalking-horse" threat is a real danger. During President Nixon's 1972 campaign, the Committee for the Re-Election of the President considered the secret funding of La Raza Unida

Appellants thus prove nothing with their asserted paradox that the disclosure provisions (and giving and spending limits) apply to minor parties on the premise that they can win, while the distribution formula for general election public financing is premised on their inability to win. The application of the disclosure provisions (and the contribution and expenditure limits) to minor parties is premised not on their probability of victory, but on the practical reality that they seek and often do affect the electoral process; consistent with this premise, their eligibility for public financing is properly gauged on the degree of their probable effect on that process.

Appellants' suggestion that only winning minor party or independent candidates should be required to disclose their contributions would prevent disclosure from playing any pre-election role. Post-election disclosure cannot provide voters with information relevant to the exercise of the franchise—a role appellants recognize as

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in an attempt to draw the vote of Spanish-speaking Americans away from the Democratic presidential candidate in several key states. *Hearings Before the Senate Select Comm., supra* note 41, at 5533-34, 5677-80. In 1970, aides to President Nixon attempted to destroy the viability of Governor Wallace as a third-party presidential candidate in 1972 by funneling $400,000 in secret funds to his opponent in the 1970 primary election for the Democratic Party's gubernatorial nomination. Testimony of Herbert W. Kalmbach, *id.* at 2144-45. A 1973 investigation by the Secretary of State of California revealed that during 1972, California Republican organizations secretly paid the filing fees and contributed other campaign funds to thirteen Peace and Freedom Party candidates in key state assembly races. Sacramento Bee, July 4, 19, 1973. As a result of the investigation, the secret contributions and expenditures were set forth in amended campaign statements by several Peace and Freedom candidates. *See Socialist Workers 1974 California Campaign Committee* v. *Brown*, 2d Civ. No. 44922 (Cal. Ct. App., filed Sept. 9, 1974), Respondents' Memorandum in Opposition to Petition for Writ of Prohibition 32.

important. Appellants' Br. 171. Nor can post-election disclosure effectively deter corrupt campaign practices or aid in the enforcement of the other provisions of the challenged statutes.

Similarly, no judicially administrable line can be drawn to effectuate appellants' suggestion (Br. 182-83), echoed by some *amici*, that Congress segregate certain candidate-supporting minor parties for treatment as issue-oriented rather than candidate-oriented groups. Ct. App. Op. 1549-60; *see United States* v. *National Committee for Impeachment*, 469 F.2d 1135 (2d Cir. 1972). Who can decide whether appellant McCarthy is seeking election or merely the dissemination of his political philosophy?

In sum, the application of the challenged disclosure provisions to all candidate-supporting parties is neither indiscriminate nor overbroad. The statute is neutral in language and application; it is not aimed at and does not discriminate against any particular group because of the content of its speech or the composition of its members. It applies equally to all. *Civil Service Commission* v. *Letter Carriers*, 413 U.S. 548, 564 (1973). Appellants have wholly failed to prove any substantial "chilling effect." If a minor party or independent candidate can prove harm from the application of the disclosure statutes, the Federal Election Commission and ultimately this Court sit viligant to protect his rights.

VII. APPELLANTS HAVE FAILED TO SHOW THAT THE CHALLENGED PUBLIC FINANCING PROVISIONS DENY THEIR FIRST OR FIFTH AMENDMENT RIGHTS

To meet the compelling need to improve the electoral process, Congress decided on a combination of related

remedies. Public financing of presidential election campaigns is the most innovative of those remedies. In adopting these provisions, Congress took the first step toward ending the dependence of candidates for public office on private wealth.[211] Someone must pay the cost of election campaigns; as Senate Majority Leader Mansfield said:

> "Shall the piper be the whole of the American people through a system of public participation in campaign financing? Or shall the tune be called more and more in the beat of special interests and great wealth?" 113 Cong. Rec. 12165 (1967).

Appellants mount a wholesale attack on this reform. They claim that the Constitution precludes Congress from adopting *any type* of public financing for presidential elections. Appellants' Br. 145-52. They also contend that the particular provisions of Subtitle H abridge their freedom of speech and discriminate invidiously against them. *Id.* at 152-69. Both attacks are unfounded.

A. The Statutory Provisions

These laws contain two groups of provisions for the financing of presidential election campaigns. Chapter 95 of Subtitle H of the Internal Revenue Code establishes a Presidential Election Campaign Fund (the

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[211] A number of foreign countries have already taken such steps. *See, e.g.*, Casper, *Williams* v. *Rhodes and Public Financing of Political Parties under the American and German Constitutions*, 1969 Sup. Ct. Rev. 271, 288-302 (German law); D. Adamany & G. Agree, *supra* note 48, ch. 9. Conditions more or less unique to American politics make it difficult to generalize from the foreign experience. *See, e.g., id.* at 181.

For examples of state public financing laws, see *American Party* v. *White*, 415 U.S. 767, 791-92 (1974) (Texas law); statutes collected in *Developments in the Law—Elections*, 88 Harv. L. Rev. 1111, 1266 & n.176 (1975).

"Fund") in the Treasury, made up of amounts designated by individual taxpayers on their income tax returns under the voluntary $1 tax checkoff provision, 26 U.S.C. § 6096. Payments will be made from the Fund to finance the general election campaigns of eligible presidential candidates as well as party conventions at which the candidates are nominated. Chapter 96 of the same subtitle authorizes federal matching payments from the Fund to help finance presidential primary campaigns.

Chapter 95 provides that the candidates of major parties (parties whose candidates received 25 percent or more of the popular vote in the previous presidential election) are entitled to equal payments from the Fund for their general election campaigns. The payments to each major party candidate may not exceed the expenditure ceiling for presidential candidates under Section 608(c)(1)(B) of Title 18 ($20 million, plus an adjustment for inflation). 26 U.S.C. §§ 9002(6), 9004(a)(1).

The candidate of a minor party (a party whose candidate received 5 to 25 percent of the vote in the preceding presidential election) is entitled to the proportion of $20 million that its candidate's vote in the preceding presidential election bore to the average of the votes received by the candidates of the major parties. *Id.* §§ 9002(7), 9004(a)(2). In addition, if a minor party candidate performs better in the current election than his party's candidate did in the preceding election, he may receive an additional payment after the election up to the proportion that his vote bears to the average of the votes received by the major party candidates in the current election. *Id.* § 9004(a)(3).

The candidate of a new party (any party that is neither a major nor a minor party) will receive no payments before the election. However, if he wins five percent or more of the vote, he is entitled to receive a payment after the election according to the same formula applicable to minor parties. *Id.* §§ 9002(8), 9004(a)(3).

A candidate of a minor or new party must qualify to be on the ballot in ten or more states in order to receive assistance. *Id.* § 9002(2)(B).

A major party candidate who accepts public financing may not accept private contributions that would cause him to exceed the $20 million expenditure ceiling. Other candidates receiving federal financing remain free to solicit and receive private contributions, subject to the contribution limits and the expenditure ceiling. *Id.* § 9003(b)(2), (c)(2).

Chapter 95 also authorizes payments from the Fund to the national committees of major and minor parties to finance their presidential nominating conventions. A major party is entitled to payments up to $2 million, adjusted for inflation. A minor party is entitled to the proportion of this amount that its vote in the preceding presidential election bears to the average vote received by the major party candidates. Federal payments for conventions may not be used to pay the expenses of any candidate or delegate at a convention, but only to pay convention expenses incurred by the national committee. Every party is forbidden to spend more than $2 million for its convention, except that the FEC may authorize additional expenditures if necessitated by extraordinary and unforeseen circumstances. *Id.* § 9008.

Chapter 96 authorizes payments from the Fund to match private contributions raised by presidential primary candidates, up to $250 per contribution. *Id.* § 9034. To become eligible to receive matching payments, a candidate must raise $5,000 in contributions (counting only the first $250 of contributions from any individual) in each of 20 states. *Id.* § 9033. Since private contributions are matched dollar-for-dollar up to the $250 maximum, a candidate may receive no more than 50 percent of his spending ceiling for primaries from the Fund. *Id.* § 9034(b).

If the Secretary of the Treasury were to determine that the amount in the Fund might not satisfy the full entitlements of all eligible candidates, he would be required to withhold from candidates the amount necessary to assure that each candidate receives his pro rata share of his full entitlement. *Id.* § 9006(b), (d). However, the Vice-Chairman of the FEC recently estimated that the Fund will contain $100 million before the 1976 elections. He said that "it is safe to anticipate that sufficient funds will be available to provide all of the public financing required under the new campaign financing legislation." [212] Each year a growing number of taxpayers choose to participate in financing the presidential election by designating $1 of their tax liability for that purpose; in 1975 alone, more than $32 million was added to the Fund. *Id.* In 1976, the taxpayers, by their voluntary decisions—rather than large campaign donors—will for the first time finance the process by which the nation chooses its President.

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[212] *See* Federal Election Commission News Release, Oct. 15, 1975. *See also* Findings I, ¶ 74, IIA J.A. 34.

B. Public Financing of Campaigns Is a Proper Use of the Spending Power that Will Promote—Not Restrict—First Amendment and Other Fundamental Constitutional Values

The financing of campaigns for federal office is a valid and appropriate use of public money. Congress is authorized by the Constitution to raise and spend money to "provide for the . . . general welfare of the United States." [213] This Court has held that "the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution." [214] It is up to Congress to decide what expenditures will promote the general welfare.

There could scarcely be a more legitimate use of public money than to reform the electoral process. Public financing will help to free candidates from dependence on large campaign contributions, reduce the fact and appearance of undue influence by large contributors, equalize the ability of all voters to participate in elections, and remove wealth or access to wealth as a qualification for election to office. Further, by diminishing the pressure to obtain private campaign funds, public financing will promote compliance with the vital disclosure requirements and giving and spending limits.[215]

Federal and state governments already pay many of the expenses of elections, recognizing that without polling and vote-counting machinery and all the related expenses there

[213] U.S. Const. art. I, § 8, cl. 1.

[214] *United States* v. *Butler*, 297 U.S. 1, 66 (1936). *See also Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937); *Helvering* v. *Davis*, 301 U.S. 619 (1937).

[215] *See, e.g.*, H.R. Rep. No. 1239, *supra* note 56, at 13-14.

could be no elections.[216] Campaigns are a no less necessary part of the electoral process.

Congress has previously used its taxing power for similar purposes, by providing federal income tax credits and deductions to encourage small contributions from large numbers of people.[217] This use of the taxing power is generally recognized not to "give rise to serious constitutional difficulties." [218] Moreover, Congress has a direct grant of legislative power to protect the electoral process. As shown above, Articles I and II authorize Congress to regulate the conduct of congressional and presidential elections.

> "[T]here can be no doubt that this broad scope of congressional power over elections is sufficiently ample to embrace the appropriation of funds with which to subsidize campaigns and parties. Congressional authority to tax and spend for the general

[216] Indeed, this Court held unconstitutional a state's attempt to require *candidates* to pay the cost of primary election machinery, stating that such a requirement would unfairly exclude candidates who were not wealthy and lacked wealthy supporters. *Bullock* v. *Carter*, 405 U.S. 134 (1972). The Court said:

> "viewing the myriad governmental functions supported from general revenues, it is difficult to single out any of a higher order than the conduct of elections at all levels to bring forth those persons desired by their fellow citizens to govern." *Id.* at 148-49.

As we have shown, high campaign costs have the same effect of excluding candidates who lack access to large sources of wealth.

[217] *See* Revenue Act of 1971, Pub. L. No. 92-178, 85 Stat. 497, §§ 701-03. The allowable credits and deductions are now $25 and $100, respectively. 26 U.S.C. §§ 41(b), 218(b).

[218] Rosenthal, *Campaign Financing and the Constitution*, 9 Harv. J. Legis. 359, 411, 417-18 (1972); Bickel, *supra* note 31, at 67; Fleishman, *Public Financing of Election Campaigns: Constitutional Constraints on Steps toward Equality of Political Influence as Citizens*, 52 N. Car. L. Rev. 349, 379 (1973). *See generally* H. Alexander, Tax Incentives for Political Contributions? (1961).

welfare surely provides the Congress with the power to implement its broad authority over elections even to the point of paying for them." [219]

Federal financing of campaigns no more offends the First Amendment than any of the other federal expenditures necessary to make elections and government work. Congress wrote these statutes with care to avoid coerced expression or coerced political association.[220] The amount that goes into the Fund is determined by the voluntary designations of taxpayers on their tax returns. In this way, the public indicates directly how much public money should be used to support the 1976 presidential campaigns.

Public financing of election campaigns places no restriction at all on First Amendment rights. No candidate is compelled to accept public financing. Appellants McCarthy and Libertarian Party have already announced they will refuse any such assistance. Findings III, McCarthy ¶ 30, IIB J.A. 718; Crane Deposition Tr. at 32-33, 62-63. The opportunity to accept public financing in no way restricts any person's freedom of speech, assembly, or petition; in-

[219] Fleishman, *supra* note 218, at 378-79 (footnote omitted). Appellants cite *Opinion of the Justices*, 197 N.E.2d 691 (Mass. 1964), holding that the Massachusetts constitution prohibits state financing of political campaigns because state funds may be spent only by state officers. That ruling has been criticized as "dubious" and having "little inherent logic." Rosenthal, *supra* note 218, at 411 n.188; Note, 78 Harv. L. Rev. 1260, 1261 (1965). Moreover, the state law involved was strikingly partisan and discriminatory: Had it been in effect for the 1964 Massachusetts gubernatorial election, the Democrats would have received 80 percent of the state funds. *Id.* at 1261. Finally, the Massachusetts ruling has no application to the federal Constitution; federal programs are numerous in which subsidies are given to persons who are not federal officials in order to promote public purposes. *E.g.*, 7 U.S.C. § 1281 *et seq.* (agricultural subsidies).

[220] *Compare International Association of Machinists* v. *Street*, 367 U.S. 740 (1961); *Lathrop* v. *Donohue*, 367 U.S. 820 (1961).

stead, it facilitates political expression by ensuring that qualified candidates will have the resources necessary to conduct effective campaigns.

C. Appellants' "Establishment" Argument Fundamentally Misconceives the Role of Government in Fostering Free Expression

Appellants lack authority for the sweeping assertion that no form of public financing of election campaigns is permissible under the Constitution. They would have this Court fill the void by "analogy" to the establishment of religion clause of the First Amendment.

The argument begins by assuming its conclusion. The Government has not "declared to the voter that some parties are more worthy of adherence than their competitors." Appellants' Br. 149. No political party has become "officially sponsored by the government." *Id.* at 145. There is no evidence here of a "scheme to establish political parties." *Id.* at 146 n.3, 148. Nor can any such scheme be concocted from the remains of defeated floor amendments (*id.* at 146 n.2) and easy speculation as to "a new formula" that "might be enacted." *Id.* at 150.[221] Appellants' "establishment" argument must stand or fall on the strength of the "analogy" asserted.

The First Amendment deals with religious freedom by marking two boundaries: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." These clauses, in the classic analysis of Professor Kurland, "should be read as stating a single precept: that Government cannot utilize religion as a standard for action or inaction because these clauses,

[221] To the extent these statements are simply an alternative formulation of appellants' "discrimination" contentions, we respond in Subparts D-F below.

read together as they should be, prohibit classification in terms of religion either to confer a benefit or to impose a burden." Kurland, *Of Church and State and the Supreme Court*, 29 U. Chi. L. Rev. 1, 96 (1961). In short, the Government may neither favor one religion over another nor promote religion generally.

The First Amendment forbids only "abridging" the freedom of speech or of the press; there is no speech or press equivalent of the establishment clause. The Constitution does not forbid the Government to foster free expression. Indeed, it is difficult to understand how the framers could have intended to prevent the Government from spending money to inform and educate the public, communicate new and controversial ideas, and promote expression by private citizens as well.

In a variety of ways, the Government recognizes that "under the Constitution speech is a premium good, to be assiduously fostered." United States *Amicus* Br. 96. It provides tax incentives to organizations devoted to developing and disseminating ideas, including the American Enterprise Institute for Public Policy Research, the Brookings Institution, the Ford Foundation, the Heritage Foundation, the National Right to Work Legal Defense and Education Fund, Planned Parenthood, and the Sierra Club Foundation.[222] The Government provides direct financial assistance to the arts and humanities, based on an express congressional finding that "it is necessary and appropriate for the federal government to help create and sustain not only a climate encouraging freedom of thought, imagina-

[222] Department of the Treasury, Internal Revenue Service Pub. 78 (1-75), Cumulative List of Organizations Described in Section 170(c) of the Internal Revenue Code of 1954, at 23, 101, 279, 360, 554, 628, 711 (rev. to Oct. 31, 1974).

tion, and inquiry but also material conditions facilitating the release of this creative talent." 20 U.S.C. § 951(5).

Moreover, the Government provides affirmative assistance to the press. The Newspaper Preservation Act, 15 U.S.C. §§ 1801-04, creates a special antitrust exemption for joint operating arrangements among newspapers, in order to maintain two editorial voices in communities where only one could otherwise survive. That Act has been upheld against a constitutional challenge based on the First and Fifth Amendments. *Bay Guardian Co.* v. *Chronicle Publishing Co.*, 344 F. Supp. 1155 (N.D. Cal. 1972). There are special United States Postal Service rates for "newspapers and other periodical publications" (39 C.F.R. § 132.2(a)(1), formerly 39 U.S.C. § 4351), as well as a special rate for certain "books" and other "educational" material (39 C.F.R. § 135.2(a)(4), formerly 39 U.S.C. 4554(a)). This Court at least implicitly upheld these provisions in affirming the constitutionality of a statute requiring that newspapers using second-class mail rates reveal certain information about their ownership and management. *Lewis Publishing Co.* v. *Morgan*, 229 U.S. 288 (1913). The Government directly disseminates news in competition with private entities, an activity recently upheld against First Amendment attack. *P.A.M. News Corp.* v. *Butz*, 514 F.2d 272 (D.C. Cir. 1975). And it provides special assistance to the Corporation for Public Broadcasting for the production of public affairs and other programs and to others for the construction of noncommercial educational broadcasting facilities. 47 U.S.C. §§ 390-96. Public support for a similar religious enterprise would of course be unconstitutional.

Professor Zechariah Chaffee, Jr. summarized the affirmative role of Government in supporting free expression as follows:

> "Just as unrestricted freedom of locomotion would be useless without streets and roads, so when communication passes beyond a conversation in a small group, somebody must provide means for reaching hearers, readers, or other consumers. Often the state or some other governmental agency is best fitted to supply the essential facilities." [223]

Through Subtitle H, the Government provides "essential facilities" which it is "best fitted to supply"—the campaign funds that will enable presidential candidates to communicate their views free of the problems associated with large private contributions.

Appellants contend—again, "by analogy" to the establishment clause—that federal financing will "necessarily involve excessive entanglement." Appellants' Br. 149. Again, that statement is premised on a series of sweeping speculations, such as the assertion that "Congress will thus continuously debate the question of who is to have what political power." *Id.* As the United States points out, "the Court, of course, must determine how likely these events are and whether, if they did occur, a judicial remedy at that time would offer a solution." *Amicus* Br. 97.

Moreover, the concept of "entanglement" is singularly appropriate in analyzing questions of religion because the Constitution precludes both restrictive and affirmative action by the Government in that area—including affirmative action that is evenhanded among competing religions.[224] Because the Constitution dictates the strictest neutrality—because the Government, in Professor Kur-

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[223] Z. Chafee, Jr., Government and Mass Communications 479 (1947, Repr. ed. 1965). *Accord,* T. Emerson, *supra* note 31, ch. XVIII.

[224] *E.g., Meek* v. *Pittinger,* 95 S. Ct. 1753 (1975); *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971).

land's phrase, "cannot utilize religion as a standard for action or inaction"—any involvement must be scrutinized for evidence that the wall of separation has been breached. But no similar concern exists when the Government fosters political communication, any more than when it assists newspapers and news services, public broadcasting, or the arts and humanities or otherwise promotes the development and communication of ideas.

Of course, when the Government undertakes to provide such assistance, it must do so in an evenhanded manner. *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624 (1943); *Hague* v. *CIO,* 307 U.S. 496 (1939). Public financing of elections must be undertaken only in such a manner as will not "freeze the political status quo," *Jenness* v. *Fortson,* 403 U.S. 431, 438 (1971); *Williams* v. *Rhodes,* 393 U.S. 23, 32 (1968). We therefore turn from apepllants' sweeping assertions about the nature of all public financing to their allegations that the particular provisions before this Court are unconstitutionally discriminatory.

D. In Providing Financial Assistance For Presidential Election Campaigns, Congress May—and Must—Make Rational Differentiations Among Political Movements

Chapters 95 and 96 are ameliorative in character, designed to reform the electoral process by removing the evils that flow from dependence on large private contributions. As such, they are subject to this Court's statement in *Katzenbach* v. *Morgan* that

> "the principle that calls for the closest scrutiny of distinctions in laws denying fundamental rights . . . is inapplicable [to a statutory formula that serves] only as a limitation on a reform measure aimed at

> eliminating an existing barrier to the exercise of the franchise. Rather, in deciding the constitutional propriety of the limitations in such a reform measure we are guided by the familiar principles that a 'statute is not invalid under the Constitution because it might have gone farther than it did' . . . that a legislature need not 'strike at all evils at the same time,' . . . and that 'reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind' . . . ." 384 U.S. 641, 657 (1966).

Chapters 95 and 96 "should be scrutinized under judicial principles sensitive to" the fact that their "thrust . . . is affirmative and reformatory," even though "every reform that benefits some more than others may be criticized for what it fails to accomplish." [225]

Any system of campaign financing must deal with the structural differences among parties and political movements and the relative degrees of support they have obtained. Chapters 95 and 96 contain allocation formulas that, like any such formulas, may be capable of producing questionable results in hypothetical or extreme circumstances.[226] However, that mere possibility provides no basis for invalidating the statute before it has had a chance to work.

Congress need not give public money to every person who calls himself a candidate for the Presidency, but may limit assistance to candidates who have demonstrated

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[225] *San Antonio School Dist.* v. *Rodriquez*, 411 U.S. 1, 39 (1973).

[226] Appellants acknowledge that direct payments "necessarily involve allocative formulas" (Br. 149), but draw from this fact the conclusion that the Constitution prohibits any federal financing, on the ground that "*no* formula can ever be fair to everyone." *Id.* (Emphasis in original.) On that theory, a good part of the laws of the United States must fall.

"a significant modicum of support." [227] Such a limitation is obviously needed to prevent waste of the taxpayers' money, to permit the fair and effective administration of the electoral process, and to avoid the confusion that would result if every self-declared candidate, whatever his support, were given substantial financial backing. The Court has recognized that

> "a State has a legitimate interest in regulating the number of candidates on the ballot. *Jenness* v. *Fortson*, 403 U.S., at 442; *Williams* v. *Rhodes*, 393 U.S. at 32. In so doing, the State understandably and properly seeks to prevent the clogging of its election machinery, avoid voter confusion, and assure that the winner is the choice of a majority, or at least a strong plurality, of those voting, without the expense and burden of runoff elections. . . . Moreover, a State has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies." [228]

Various statutory tests can and have been used to accomplish these purposes. Every state imposes qualifications that a candidate must meet to be listed on the ballot. State laws generally allow candidates of established parties, which have received substantial support in past elections, to be listed on the basis of their past electoral support. Independent candidates and candidates of new parties may generally obtain ballot position by showing their support in some other way, such as submission of petitions

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[227] *Jenness* v. *Fortson*, 403 U.S. 431, 442 (1971).

[228] *Bullock* v. *Carter*, 405 U.S. 134, 145 (1972). *Accord, American Party* v. *White*, 415 U.S. 767, 782 n.14 (1974); *Storer* v. *Brown*, 415 U.S. 724, 732-33 (1974); *Lubin* v. *Panish*, 415 U.S. 709, 715-16 (1974).

signed by a specified percentage of the electorate.[229] Although constitutional questions have arisen in a few cases where states imposed unreasonably onerous ballot qualifications,[230] the Court has held that reasonable conditions of this type are permissible and that the interests they serve are compelling.[231] Just as a state may refuse ballot position altogether to candidates or parties that fail to show significant public support, the federal government may—under neutral criteria—refrain from affording insubstantial candidates the same amounts of federal campaign assistance as significant candidates.

Indeed, an additional compelling interest is present in the case of public financing that does not come into play when only a ballot position is at stake. If public financing were available to every potential candidate, regardless of his chance of success, it would create an artificial and non-neutral stimulus to the proliferation of splinter parties, endangering the stability and effectiveness of the two-party system that has evolved without government intervention. This Court has recognized that avoidance of splinter parties and maintenance of political stability are compelling interests:

> ". . . California apparently believes with the founding fathers that splintered parties and unrestrained factionalism may do significant damage to the fabric of government. See The Federalist, No. 10 (Madison) . . . . [T]he State's interest in the stability of its political system . . . . [is] not only

[229] *See Developments in the Law—Elections*, 88 Harv. L. Rev. 1111, 1123-26 (1975).

[230] *See Williams* v. *Rhodes*, 393 U.S. 23 (1968); *Bullock* v. *Carter*, 405 U.S. 134 (1972); *cf. Storer* v. *Brown*, 415 U.S. 724 (1974).

[231] *See Jenness* v. *Fortson*, 403 U.S. 431 (1971); *American Party* v. *White*, 415 U.S. 767, 786 (1974).

> permissible, but compelling . . . ." *Storer* v. *Brown*, 415 U.S. 724, 736 (1974).

The Court has recognized similar interests in holding that states may require voters to be party members for some period of time before a primary, *Rosario* v. *Rockefeller*, 410 U.S. 752, 760-62 (1973); *id.* at 765, 768-69 (dissenting opinion). The Court has suggested that there is a compelling interest in protecting "a two-party system in order to encourage compromise and political stability," as long as a statute does not impermissibly "favor two particular parties." [232]

Subtitle H does not affirmatively favor either the two-party system or any particular parties; its formula would work equally well if, for example, there were three major parties. After considering the constitutional issues at length,[233] Congress carefully avoided altering the political balance *either* by freezing out third party movements *or* by artificially inducing them.[234] To hold that Congress cannot make distinctions for that purpose "would utterly violate common sense." [235] "Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike." *Jenness* v. *Fortson*, 403 U.S. at 442.

[232] *Williams* v. *Rhodes*, 393 U.S. 23, 31-32 (1968); *see Developments in the Law—Elections*, 88 Harv. L. Rev. 1111, 1138 (1975) ("It seems undeniable that the political stability that a two-party system fosters . . . is a compelling state interest."). *See also* Affidavit of James MacGregor Burns, *supra* note 58, ¶ 11.

[233] *See, e.g.*, 112 Cong. Rec. 28250-53 (1966); 113 Cong. Rec. 8059-63, 8299-300, 8309-11, 8321-22 (1967); 117 Cong. Rec. 45826 (1971); S. Rep. No. 310, *supra* note 172, at 8-9.

[234] *See* H.R. Rep. No. 1239, *supra* note 56, at 13; S. Rep. No. 689, *supra* note 35, at 8.

[235] Fleishman, *supra* note 218, at 398-99.

E. Appellants Have Failed To Prove That Chapter 95 Invidiously Discriminates Against Them

Appellants allege that the system of public financing for presidential general election campaigns established by Chapter 95 is unconstitutional because it discriminates against third parties. But in fact Chapter 95 provides for differential treatment based on an objective formula that is reasonably designed to avoid artificial distortion of third party strength and that leaves the way open for a new or minor party to become a major party in the next election if it attracts enough popular support.

Assuming that the Fund contains a sufficient amount from designations by taxpayers under Section 6096 (as is virtually certain for 1976), a major party candidate will receive $20 million for his general election campaign. (For simplicity, this discussion disregards the effect of the inflation adjustment under 18 U.S.C. § 608 (d).) Since he is not permitted to spend more than that amount, he will not be allowed to accept private campaign contributions.[236] A minor party candidate will receive a proportionate amount based on his party's performance in relation to the average of the major parties in the last election.

A new party will receive federal assistance only if it establishes significant public support by obtaining five percent or more of the vote in the current election. If it does so, or if a minor party betters its previous performance vis-a-vis the average of the major parties, the new or minor party will receive additional payments

[236] 26 U.S.C. § 9003(b). Of course, a major party candidate may refuse to accept federal financing. If he does so, he will be free to solicit and receive contributions and to make expenditures up to the $20 million ceiling in § 608(c), plus 20 percent for fund-raising costs.

based on its electoral showing. Since that showing cannot be known until the votes are counted, the additional payments can only be made after the election. Such a party will be free to raise and spend private contributions up to the ceiling.

If a minor or new party receives 25 percent of the vote in a presidential election, it will be a major party in the next election and receive $20 million of assistance. Moreover, if its vote matches the average of the major parties' votes, its post-election payments for the current election will bring it up to the major parties' $20 million level of assistance.

These formulas represent a conscientous effort by Congress to be evenhanded in the treatment of different types of political movements without improving the lot of any at the expense of others. Major parties—that is, those with broad past support—receive equal assistance in amounts greater than those received by minor parties. In giving the major parties equal amounts, Congress recognized that each of them is a vehicle for political expression by a sizeable portion of the population and attempts to appeal to a majority of the electorate. To give greater resources to either, based on its success in the preceding or the current election, might increase the advantage of the incumbent party and make it more difficult for a new majority favoring the opposition to replace the party in power. As a practical matter, the voters' only real alternative to the party in power is often a major party out of power, and the challenged legislation does not weaken that alternative. Neither of the present major parties challenges this equal treatment as a plaintiff here.

The differential treatment of minor parties is permissible in view of the "obvious differences in kind between

the needs and potentials of a political party with historically established broad support, on the one hand, and a new or small political organization on the other." *Jenness* v. *Fortson*, 403 U.S. at 441. A minor party's strength is reasonably measured by comparison to the average of the major parties.[237]

The statute in no way enshrines any particular parties; it leaves all parties free to move from one category to another on the basis of demonstrated public support.[238] A major party will become a minor party if it fails to attract 25 percent of the vote in a presidential election. Minor or new parties are equally free to move upward as they gain public support. Thus, the statute does not impair the "potential fluidity of American political life." [239]

1. *Contrary to Appellants' Assertions, the Record Shows a Lengthy and Persistent Effort By Congress to Adhere to This Court's Guidance*

The major thrust of appellants' attack on the treatment of third parties is their assertion that "Congress had little use for third parties . . . ." [240] Of course, any

[237] "To insure constitutionality, . . . the minor party entitlement . . . should be calculated . . . as a ratio, in other words as the proportion of the major party entitlement which the minor party vote bears to the average of the major party votes. . . . Such a ratio also ensures that if a minor party acquires more and more votes, its subsidy entitlement will not be markedly less than the major parties' entitlement at points just below the threshold for qualification as a major party." Fleishman, *supra* note 218, at 401.

[238] *Cf. Morey* v. *Doud*, 354 U.S. 457 (1957).

[239] *Jenness* v. *Fortson*, 403 U.S. 431, 439 (1971).

[240] Appellants' Br. 161. Appellants cite in support of this proposition the statement in S. Rep. No. 689, *supra* note 35, at 8, regarding the fear that "splinter parties" and candidates "would undermine the stability provided by a strong two party system . . . ." The language so disapproved by appellants is practically a quote

congressional debate necessarily reflects the differing—and sometimes conflicting—motives of the members of Congress involved. And any congressional discussion of political matters inevitably contains some frank political talk by a few individual members that may be far from the view of the majority. But as Mr. Justice Cardozo said, despite the spread of "psychoanalysis . . . to unaccustomed fields . . . . [t]here is a wise and ancient doctrine that a court will not inquire into the motives of a legislative body or assume them to be wrongful." *United States* v. *Constantine*, 296 U.S. 287, 299 (1935) (dissenting).

Moreover, a review of the legislative record shows that Congress took care to avoid discriminating against third party candidates. In 1971, at the opening of the debate on the Pastore Amendment that became Chapter 95, Senator Kennedy, a co-sponsor, spoke directly to this question:

> "The 5 to 25 percent formula strikes a reasonable balance for minor parties and new parties. It neither freezes them out entirely, nor encourage[s] them excessively. The threshold showing required of such parties is low enough to prevent 'locking in' the existing two-party system, and yet high enough to prevent the artificial proliferation of splinter parties set up merely to have a political joyride at the taxpayer's expense in a presidential year." 117 Cong. Rec. S18894 (daily ed. Nov. 17, 1971).

Three years later, commenting on this formula, the Senate Rules Committee expressed a virtually identical concern:

from this Court's decision in *Storer* v. *Brown*, 415 U.S. 724, 736 (1974), *see* pp. 196-97 *supra*.

"The bill also provides a balanced approach to the difficult issues posed by minor parties.

"On the one hand, the Committee bill would not stimulate a proliferation of splinter parties or independent candidates. Such a proliferation would undermine the stability provided by a strong two-party system and could polarize voters on the basis of a single volatile issue.

* * * *

"At the same time, minor parties with significant support are eligible to receive a fair share of public assistance commensurate with their proven political strength.

* * * *

"In short, minor parties will retain their present opportunity—one constitutionally required—to grow into a major political force if their support is widespread and not a transient phenomenon. As the United States Supreme Court has noted, the legitimate interest in preserving the benefits of two major parties does not justify laws which would choke off competition by other parties with potential appeals to the electorate.

"The bill complies with this requirement. It does not prevent minor parties from placing candidates on the ballot or from organizing resources to support them. It does not freeze the political status quo. Compare *Williams* v. *Rhodes*, 393 U.S. 23 (1968), with *Jenness* v. *Fortson*, 403 U.S. 431 (1971)." S. Rep. No. 689, *supra* note 35, at 8-9.

As the court of appeals observed, "the legislative history indicates that Congress had in mind the Supreme Court's specific approval in *Jenness* of a system which bases differential treatment on 'demonstrated relative strength' in prior elections." (Ct. App. Op. 1564) Indeed,

the development of public financing legislation closely tracks the guidance provided in this Court's decisions. The original public financing measure for presidential elections was adopted in 1966, when this Court had provided little illumination of the area. Presidential Election Campaign Fund Act of 1966, Pub. L. No. 89-909, 80 Stat. 1587-90. The 1966 Act placed parties rather than candidates in control of funds, required minor parties to poll over seven percent of the votes in the previous election in order to receive any financing, and failed to provide any payments whatsoever based on performance in the present election.[241] In 1967, after substantial debate, Congress suspended the operation of the 1966 statute. 81 Stat. 57. The Court's decision the following year in *Williams* v. *Rhodes* raised additional questions about the kinds of distinctions incorporated in the suspended 1966 Act. It was not until this Court's unanimous decision in *Jenness* on June 21, 1971, that clear guidelines became available on the permissible scope of differentiation in providing public financing for both major and minor parties. Five months after that decision, Senator Pastore introduced the provision that became Chapter 95.[242] This Court's later decisions in *Bullock*, *Storer*, and *American Party* were promptly re-

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[241] All of these problems are remedied in the challenged legislation. *Compare* Pub. L. No. 89-809, § 303(c), 80 Stat. 1588-89, *with* 26 U.S.C. §§ 9003, 9004, 9006; *compare* Pub. L. No. 89-809, § 303 (c)(2)(B), 80 Stat. 1588, *with* 26 U.S.C. § 9002(7); *compare* Pub. L. No. 89-809, § 303(c)(2), 80 Stat. 1588-89, *with* 26 U.S.C. § 9004 (a)(3).

[242] Sen. Amdt. No. 692 to H.R. 10947, 92d Cong., 1st Sess. (Nov. 16, 1971). Chapter 95 was originally enacted, in substantially its present form, by title VIII of the Revenue Act of 1971, Pub. L. 92-178, to become effective after the 1972 presidential election, *id.* § 802. It was modified in 1973 by Pub. L. 93-53, § 6, *see* note 256, *infra*, and by the FECA Amendments of 1974, Pub. L. 93-443, §§ 403-08.

flected in congressional debate and reports. Thus there is ample evidence that Congress showed serious concern —not "little use"—for third parties and paid close attention to this Court's recent decisions on the subject.

2. *The Treatment of Minor Parties is Not Invidiously Discriminatory*

Appellants attack the formula for assistance to minor parties, asserting that various hypothetical events might yield results they find unsatisfactory. Appellants' Br. 153-54. But Congress cannot be expected to act with mathematical precision. The Constitution does not require precise adherence to an equal-dollars-per-vote standard or any other arbitrary rule.[243] If Congress adopts an objective standard that reasonably reflects relative electoral performance, as it has in Chapter 95, the requirements of equal protection are satisfied. The "procedure may not always be a completely precise or satisfactory barometer of actual community support for a political party, but the Constitution has never required the States to do the impossible." *American Party* v. *White*, 415 U.S. at 786-87.

Besides, it would be premature and unwise for the Court to test Chapter 95's formula for assistance to minor parties on the basis of speculative and hypothetical future events, rather than on the facts before it and the experience of history. Appellants ignore the significant forces that have been shown to govern the emergence of third parties in this country.

> "The emergence of significant third parties depends on the coincidence of four factors: severe national conflict over a few very important issues, a period of "crisis politics"; division of the electorate on one or more of these issues into at least one intense and estranged minority and a broad majority; rejection or avoidance of the position of the minority by both major parties, causing alienation of the minority; and a politician or political group willing to exploit the situation by initiating a new party. Such a combination assures an appreciable third-party vote.
>
> "The conditions, however, are cumulative; each is necessary for the next to operate. Hence, except in a period of crisis, politically active minorities will usually be absorbed by the major parties; seldom will they be drawn into a third party. If during a crisis the major parties take opposing positions, little leeway remains for a third party. Lacking a political crisis and an intense minority to appeal to, few politicians of repute will venture to lead a third-party effort. But in a period of crisis when a minority emerges and the major parties ignore it, significant third parties appear. Together, the four conditions are sufficient to produce a large third-party vote." [244]

It is highly unlikely that a movement with such political force will be unable to raise sufficient private financing to communicate its views effectively—or that its emergence will be deterred by the prospect of differential treatment in federal campaign financing.

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[243] Even if dollars-per-vote were the appropriate constitutional standard, appellants' hypotheticals show no discrimination. Because minor party financing is determined by the average showing of the major parties, minor parties will receive fewer dollars per vote than the lower ranking major party, but more dollars per vote than the winning party. It is difficult for a minor party to allege discrimination when it has been benefited (on the dollars-per-vote standard) more than the victor.

[244] D. Mazmanian, Third Parties in Presidential Elections 136-37 (1974). *See also id.* at 26-27; J. Sundquist, Dynamics of the Party System ch. 13 (973).

Indeed, history suggests that the availability of funding under the formula of Chapter 95 would, if anything, have benefited significant past third-party movements. For example, appellants assert that "had the challenged statutes been in effect at the time of the emergence of the Republican Party, 'the grave of Abraham Lincoln would have been just another burial plot in the cemetery.'" Appellants' Br. 152 n.7; *accord*, Metcalf *Amicus* Br. 30. But the Republican party did not burst unexpectedly to victory in 1860; the rise of the slavery issue "as a polarizing force was reflected in a slow and intermittent but inexorable rise in the voting power of the third-party movement[ ]."[245] The Republican Party had received one-third of the vote in 1856, and Lincoln would have received full federal financing for his 1860 campaign. *See* Findings I, ¶ 85, IIA J.A. 37.

Moreover, only once in modern history have we faced a situation remotely resembling those hypothesized by appellants—when the Bull Moose party split from the Republican Party in 1912. Even here, appellants' hypothetical examples are addressed not to the effect of the formula in an election such as 1912, but to its effect in the next ensuing election. History suggests appellants' concern is misplaced. Almost invariably, a "major party actively courts the disaffected group and wins its confidence, spelling doom for the third party."[246] For example, in 1916 the Progressives again nominated Theodore Roosevelt; the Republicans nominated the progressive Charles Evans Hughes, which led Roosevelt to withdraw in favor of Hughes and eliminated a separate Progressive ticket.[247] Although the prospect of public financing for the third party in a forthcoming election might increase its resistance to such courtship, it would also enhance the major party's incentive to bring the disaffected group within its fold.

[245] J. Sundquist, *supra* note 244, at 289-90. *See also id.*, chs. 4-5; D. Mazmanian, *supra* note 244, at 39-46.

[246] D. Mazmanian, *supra* note 244, at 139. *See also id.* at 25-26, 143-44, 149.

But most importantly, no such question is presently before this Court. The major parties each received over 25 percent and no other party received between five and 25 percent of the vote in the 1972 election. Neither the Bull Moose phenomenon nor any of its variants can affect the operation of the formula in the 1976 election, and no present or potential candidate—let alone any appellant—presently qualifies for minor party treatment under Chapter 95 in the 1976 election. If a Bull Moose phenomenon occurs in 1976, it will be time enough then for Congress to make any necessary adjustments for 1980, and if it fails to do so, for this Court to judge the constitutionality of the formula in such a context.

3. *The Treatment of New Parties Is Not Invidiously Discriminatory*

Appellants contend that Chapter 95 invidiously discriminates against new parties by denying them financial assistance for an election campaign because of their fail-

[247] J. Sundquist, *supra* note 244, at 165. Whether or not Roosevelt had withdrawn, application of the current formula to the 1916 election would not have produced an unreasonable financial result. The Democratic candidate and any Progressive candidate would each have received an equal amount, and the Republican candidate would have received 67 percent of that amount. *See* Findings I, ¶ 85, IIA J.A. 40. Hughes, the Republican candidate, would almost certainly have been able to raise the remaining 33 percent from private contributions, as the formula permits, and thus to spend the same amount as President Wilson.

A further example is provided by the absorption of the People's Party, which gained 8.5 percent of the popular vote in 1892, into the Democratic party by the time of the 1896 election. *See* J. Sundquist, *supra* note 248, ch. 7.

ure to receive five percent of the vote in the preceding presidential election or in the current presidential election. We disagree.

Recent decisions of this Court make clear that there is nothing unconstitutional about denying federal assistance to parties that failed to gain a significant vote in the preceding election. In *Jenness* v. *Fortson*, 403 U.S. 431 (1971), the Court unanimously upheld a statutory formula indistinguishable from Chapter 95, which was applied by Georgia to determine which candidates were entitled to positions on the ballot for elective state offices.

The Georgia law entitled any political organization whose candidate had received 20 percent or more of the vote in the last gubernatorial or presidential election to have its candidate automatically placed on the ballot in the next election. Any other political organization could have its nominee placed on the ballot only by filing a nominating petition signed by five percent or more of those eligible to vote at the last election for the office sought. The Court rejected the claim that these requirements operated "to freeze the political status quo":

> ". . . Georgia in no way freezes the status quo, but implicitly recognizes the potential fluidity of American political life. Thus, any political body that wins as much as 20% support in an election becomes a 'political party' with its attendant ballot position rights and primary election obligations, and any 'political party' whose support at the polls falls below that figure reverts to the status of a 'political body' with its attendant nominating petition responsibilities and freedom from primary election duties. We can find in this system nothing that abridges the rights of free speech and association secured by the First and the Fourteenth Amendments." *Id.* at 439-40.

This reasoning applies precisely to the treatment of new parties in Chapter 95.

The Court in *Jenness* also rejected the argument that the need of some candidates to obtain signatures of five percent of the electorate invidiously discriminated against those candidates. The Court pointed out that the nomination of a major party is difficult to obtain. It refused to assume that it is "inherently more burdensome" for a candidate to gather the signatures of five percent of the electorate than it is to win the nomination of a party whose broad support in the last election entitles its nominees automatically to ballot positions.

> "The fact is, of course, that from the point of view of one who aspires to elective public office in Georgia, alternative routes are available to getting his name printed on the ballot. He may enter the primary of a political party, or he may circulate nominating petitions either as an independent candidate or under the sponsorship of a political organization. We cannot see how Georgia has violated the Equal Protection Clause of the Fourteenth Amendment by making available these two alternative paths, neither of which can be assumed to be inherently more burdensome than the other." *Id.* at 440-41.

The Court upheld the five percent support requirement, stating that:

> "There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election." *Id.* at 442.

The five percent support requirement for federal financing in Chapter 95 is valid for the same reasons. There is no ground for assuming that it is necessarily more burdensome for a candidate to obtain five percent of the vote in a general election than it is to win the nomination of one of the established political parties. An aspirant for the Presidency may seek that office by alternative routes: working within an established party or forming a new political organization. Appellant McCarthy, having tried the former route in 1968, has now chosen to try the latter. Chapter 95 holds out the prospect of federal assistance in the general election to a candidate who qualifies either by winning a major or minor party nomination or by winning five percent or more of the general election vote. Congress did not deny equal protection of the laws "by making available these two alternative paths."

Chapter 95 is no more discriminatory if considered from the viewpoint of a new party—like the Libertarian Party—rather than its candidate. Obviously, a new party would be better off if, despite its lack of a track record of public support, Chapter 95 treated it as favorably as it does parties with a record of electoral success. However, Congress is not forbidden to require that a party establish "a significant modicum of support," *id.* at 442, in one way or another. Nor is the five percent figure chosen by Congress an "impossible dream." Over the past century, a minor party candidate achieved over five percent in four of the 25 presidential elections, or 16 percent of the time.[248] The choice of that percentage

[248] *See* Findings I, ¶ 85, IIA J.A. 38-40 (James B. Weaver, People's Party, 1892; Theodore Roosevelt, Progressive Party, 1912; Robert M. LaFollette, Progressive Party, 1924; George C. Wallace, American Independent Party, 1968).

figure, which is the same as the one upheld in *Jenness*, is obviously a permissible legislative judgment. As Mr. Justice Holmes said in *Louisville Gas Co.* v. *Coleman*, 277 U.S. 32, 41 (1928):

> "[W]hen it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark." [249]

[249] If the Court should nevertheless conclude that Chapter 95 invidiously discriminates against new parties by permitting them to receive assistance only if they win five percent of the vote in the preceding or the current election, it should not invalidate all of Chapter 95. 26 U.S.C. § 7852(a) (separability clause). It should hold the statute unconstitutional only to the extent that Section 9004(a)(3) bars proportional pre-election financing to a party that received some votes but less than five percent in the preceding presidential election and to the extent that it bars proportional post-election financing to a party that receives some votes but less than five percent in the current election.

The fact that striking the exclusions for new parties would expand the coverage of Chapter 95 is not an obstacle to severability. It is well established that a court, on holding a statute unconstitutional in part, can expand the scope of the statute if the expansion will cure its legal infirmity and promote the major purpose of Congress. As Mr. Justice Harlan said, concurring in *Welsh* v. *United States*, 398 U.S. 333, 361 (1970):

> "Where a statute is defective because of underinclusion there exist two remedial alternatives: a court may either declare it a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion. Cf. *Skinner* v. *Oklahoma*, 316 U.S. 535, 543 (1942); *Iowa Des-Moines National Bank* v. *Bennett*, 284 U.S. 239 (1931)".

See also Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065, 1136-37 (1969). The Court has applied this principle in many cases, cost recently in *Weinberger* v. *Wiesenfeld*, 43 U.S.L.W. 4393 (March 19, 1975) (extending social security benefits to widowers after holding that their exclusion was unconstitutional). *See also Neal* v. *Delaware*, 103 U.S. 370 (1880); *Sweatt* v. *Painter*, 339 U.S. 629 (1950). In this case, the legislative purpose would clearly

4. *Chapter 95 Provides Realistic Alternative Means of Financing Third Party Presidential Campaigns*

Appellants argue that receiving money before the election is better than receiving it after the election. However, if—as the Court held in *Jenness*—electoral success may be used as a measure of public support, it is impossible to assist a new party on the basis of such a measure until after the votes have been counted. Congress has provided that both major and minor parties will receive assistance before the election to the extent that their entitlements can be calculated on the basis of past election results. The same obviously cannot be done for a new party. Nor is it feasible for this purpose to use such alternative measures of support as petition signatures or public opinion polls, as the court of appeals (Ct. App. Op. 1563-64) and the United States (*Amicus* Br. 101 n.63) have agreed. The best that can be done is to provide assistance *after* the election based on the new party's performance, in order to enable the party to repay loans and contributions—thus, incidentally, building further goodwill with its supporters. Equal protection of the laws cannot require greater equality than is feasible.

Appellants attempt to distinguish this Court's ballot access decisions. They assert that "there is only one route by which a prospective candidate can reach the goal of obtaining general election federal subsidy money before the November election" (Br. 159), and conclude that the absence of "two alternative routes to reach the goal" violates the equal protection standards established by this Court in *Jenness* and *Lubin* v. *Panish*, 415 U.S. 709 (1974). The purported distinction is fallacious.

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be better effectuated by extending payments proportionately to new parties than by invalidating the entire system of financing presidential general election campaigns.

First, what this Court said in *Jenness* and *Lubin* was that the state must provide a realistic alternative means of access to the ballot where the state has *restricted such access*, by requiring a specified previous electoral performance or filing fee. Chapter 95, on the other hand, provides only affirmative assistance; since it does not restrict electoral opportunities, it need not provide alternative routes to surmount any restrictions. The provisions of Chapter 95 in no way "burden either a minority party's or an individual candidate's . . . important interest in the continued availability of political opportunity." *Lubin* v. *Panish*, 415 U.S. at 716. Chapter 95 can be regarded as restrictive only if one mistakes the objective of presidential candidates. Appellants allege that "the candidate's goal is to obtain the general election federal subsidy . . . ." Br. 159. But federal money is no more an objective of presidential candidates than any particular means of ballot access was an objective of the Georgia candidates who brought *Jenness*. The Georgia candidates wanted access to the ballot by whatever means, just as presidential candidates want access to sufficient funds, by whatever means, to fuel an effective campaign. Chapter 95 does not reduce the number of paths to that goal; it adds one—federal assistance.

Second, Congress has provided alternative paths even to obtain federal assistance. They are the same "alternative routes" specifically provided in *Jenness*. 403 U.S. at 440. A candidate may choose either to fight and win the nomination of a major party or to fight independently to gain the support of five percent or more of the electorate—"neither of which can be assumed to be inherently more burdensome than the other." *Id.* at 441. A

candidate who chooses the latter route receives federal payments at the earliest opportunity after he has demonstrated sufficient support. And the prospect of federal assistance after the election should be very useful to a new party that has a realistic prospect of getting a sizable vote. Governor Wallace's 13.5 percent showing in the 1968 presidential election did not come as an election-day surprise; it had been predicted by public opinion polls and political experts well before the election. A new party with such prospects of success will find its ability to obtain commercial credit and loans to finance a campaign enhanced by the prospect of federal assistance in repaying the loans after the election. Political supporters can be asked to contribute by making loans up to $1,000 for individuals—$5,000 for qualified committees—repayable after the election. In addition, ordinary bank loans are available without regard to the contribution limits in Section 608.[250] Therefore, even for a new party, Chapter 95 provides a measure of financial assistance before, and not merely after, an election.

There is a final and decisive point with respect to the "discrimination" allegedly resulting from the alternative

[250] The challenged statutes expressly permit candidates to receive, without limitation, any "loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business." 18 U.S.C. § 591(e). Such loans are also excluded from the prohibition of any "contribution" by a national bank. 18 U.S.C. § 610. The legislative history of these provisions indicates that Congress intended all parties, including new parties, to be free to finance their campaigns by ordinary bank loans in any amount, except that loans made only on an endorsement or guarantee are considered to be contributions by the endorser or guarantor, subject to the contribution limits. *See* S. Rep. No. 229, 92d Cong., 1st Sess. 59, 121 (1971); 117 Cong. Rec. 43385-86 (1971). Even before these provisions were inserted in Sections

paths created by the public financing provisions. When public financing is considered together with the other features of these laws, it is clear that minor and new parties will find their financial positions enhanced relative to major parties. As the court of appeals said, "it should be borne in mind that smaller parties are likely to be the major beneficiaries of another part of the statutory scheme, the expenditure ceilings." Ct. App. Op. 1564. They will also benefit from the contribution limits. *See* Part V, *supra*.

In the 1972 presidential election, each of the major party candidates had no trouble raising more than $20 million of private funds before the election. The Democratic candidate raised $38 million; the Republican candidate raised $60 million. Findings IIA, ¶ 71, IIB J.A. 457. Even if the excess over $1,000 of each contribution had been eliminated, the Democratic and Republican candidates would each have raised over $24 million. *Id.* ¶ 72, IIB J.A. 457. Minor and new party candidates in the aggregate raised $1,043,000 in 1972; eliminating the excess over $1,000 of each contribution, they would have raised $977,000.[251] That is only one percent of the $98 million raised by the major party candidates.

In 1976, neither the Republican nor the Democratic candidate may spend more than $20 million in the general

591(e) and 610, bank loans were made to finance political campaigns. *See e.g., United States* v. *First National Bank*, 329 F. Supp. 1251 (S.D. Ohio 1971).

[251] Findings IIA, ¶¶ 71, 72; IIB J.A. 457. This figure is not significantly less than the $1,043,000 actually raised by minor and new parties because, as we have shown, they rely much less than major parties on large contributions. *See* pp. 113-18, *supra*.

election, whether in public or private money. If minor and new party candidates raise only the same amounts in 1976 as they did in 1972, they will be proportionately much better off financially compared to the major parties. Their spending as a percent of the $40 million the major parties may spend in the general election will be 2.5 percent, or more than double the 1972 figure. The additional fund-raising ability they should have because of the possibility of receiving federal assistance after the election may enable them to do even better. The result appears to bear out the prediction of Professor Rosenthal:

> "If [third parties] were treated generously even though not equally, it might be shown that they were in fact accorded a better chance to convey their views to the voters than if all parties were dependent solely on private contributions." [252]

Thus, despite appellants' protestations, the court of appeals rightly concluded that "third party and independent candidates are now in a better position to approach the spending levels of the major parties." Ct. App. Op. 1564. Appellants have failed to show that the alternative routes to presidential campaign financing provided by Chapter 95 "discriminate" against minor or new parties.

5. *No Other Financing Mechanism Has Been Shown to Provide a "Less Restrictive Means"*

Appellants suggest that there are less restrictive means of providing public financing. Of course, they carefully

[252] Rosenthal, *supra* note 218, at 416. *See also* Affidavit of James MacGregor Burns, *supra* note 58, ¶ 11.

refrain from endorsing any of the alternatives they advance. Moreover, they offer their alternatives without meaningful elaboration or analysis.

Alternatives are always offered when a new and complex legislative program is debated. Adherents of particular proposals always assert that their method is the most effective, the least restrictive, or the sole constitutional means of attaining the legislative objective. For example, appellants assert that "many of the difficulties created by subtitle H . . . can be avoided by a 'voucher' scheme," in which the Government would distribute subsidy vouchers directly to individuals, who would in turn contribute the vouchers to the candidates of their choice. Appellants' Br. 151. Appellants ignore the obvious defects of such a scheme.[253] The voucher system could focus enormous political power in organized groups able to collect vouchers quickly and efficiently, tempting such groups to use coercion or other unacceptable means to aggregate their voucher strength. Since vouchers would be the equivalent of money, a "black market" might develop in which vouchers would be bought from voters at a discount by political candidates or committees or by intermediaries. A voucher system would impose an enormous administrative and financial burden, estimated by one proponent at $50 million if public financing were extended to all federal elections.[254] A voucher system would not, like direct federal grants, permit a candidate to know when he will

[253] *See, e.g.*, American Bar Association Special Committee on Election Reform, Symposium on Campaign Financing Regulation 103-14 (1975); J. Kirby, Congress and the Public Trust, Report of the Association of the Bar of the City of New York Special Committee on Congressional Ethics 131 (1970). The *Report* concludes that "the direct Federal subsidy seems preferable to the other choices." *Id.*

[254] ABA Special Committee Symposium, *supra* note 253, at 103-04.

receive the federal aid; the timing would hinge on the decisions of millions of voucher holders.

The leading congressional advocate of the voucher plan, Senator Metcalf, has filed a brief *amicus curiae* of which one paragraph (Br. 48) is devoted to these frequent criticisms, most of which had been raised below. He asserts that many of the difficulties could be "averted by . . . harsh criminal penalties." As to the randomness in the timing of receiving vouchers, this "presumably is a matter over which the candidate enjoys some control." *Id.* Other proponents of the voucher plan have responded to these criticisms by formulating increasingly complicated schemes. The latest is a "modified voucher system" supplemented by "private giving" and involving both "flat and proportional grants." D. Adamany & G. Agree, *supra* note 44, at 199. Despite its novelty, this proposal has already itself been criticized. T. Schwartz, Public Financing of Elections: A Constitutional Division of the Wealth 87 (1975). The current dispute over the voucher system illustrates the difficult policy questions underlying the selection of the most effective, least restrictive system of public financing—and offers further reason for deferring to the judgment of Congress.

The other alternative suggested by appellants is "a tax checkoff system that would allow taxpayers to designate their choice of candidates or parties . . . ." Appellants' Br. 163. Congress rejected that alternative because, at the time when income tax returns are filed on April 15, it is impossible to know who the nominees will be, and accordingly such a provision would discriminate primarily against third parties. As Senator Pastore explained:

> "So, what happens? When you attempt to designate your party, you are doing that by April 15,

> 1972.[255] That is the last day to file the income tax return. How do you know if McCarthy will run? How do you check him off? What do you do for him? . . . . But let the Senator tell me how we handle the situation where the known candidate will get the checkoff and those not yet known cannot get the checkoff because the taxpayer does not know who he is yet or what party he will represent yet. What do we do about that?
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> "What concerns me is what do we do about minority parties? Take the Wallace candidacy. Whether you like him or not, whether you vote for him or not, he has a right as an American to run. He has a right to be treated like everyone else. That is what you are trying to do. By the same token, someone else might come along and file in a certain number of States whereby he becomes qualified on the presidential ballot. He is a candidate no one ever heard of on April 15 because he does not file until May, June or July, and he was out of the picture completely then. What happens to him?
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> "Where is the equity? That is what disturbs me." 117 Cong. Rec. 42376 (1971).[256]

Thus appellants' "far less discriminatory" system (Br. 163) may in fact be more discriminatory.

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[255] Senator Pastore might have added that the fund is built up in annual increments over the four years between presidential elections, and that the taxpayer's quandry in 1969, 1970, and 1971 would have been worse than in 1972.

[256] In fact, Chapter 95 as enacted in 1971 included a mixed system in which a taxpayer could make a party designation. *See* Pub. L. No. 92-178, § 802(a), 85 Stat. 573. This provision was removed in 1973, Pub. L. No. 93-53, § 6(a), 87 Stat. 134, both for the reasons stated and because "it seems inappropriate for the person examining a tax return to know the taxpayer's political affiliation." 119 Cong. Rec. 22396 (daily ed. June 29, 1973) (remarks of Rep. Mills); *accord, id.* at 22598 (June 30, 1973) (Sen. Long).

The United States as *Amicus* asks whether a system of matching funds similar to that provided for presidential primary elections under Chapter 96, discussed below, could be used for general elections as well.[257] But matching grants in the general election might act as an artificial incentive to entry by additional candidates, after the party primary and nominating processes, thus encouraging the splintering and proliferation of parties. In primaries, multiple candidacies have been a common facet of American political life; in general elections, they have been much less so. Congress had reason to fear that a new incentive for multiple parties in general elections might threaten the nation's political stability. Because of the inherent differences between primary and general elections, Congress adopted differing financing mechanisms in order to prevent the distortion of either process. *See, e.g.*, S. Rep. No. 689, *supra* note 35, at 5-9. Moreover, a matching system is subject to some of the same uncertainties in timing associated with the voucher plan; the court of appeals concluded it was "a more cumbersome system" than the approach of Chapter 95. Ct. App. Op. 1564.

Even more importantly, a matching system would not accomplish the congressional objective of taking the first experimental step toward eliminating dependence on private contributions in federal election campaigns. *See, e.g.*, S. Rep. No. 689, *supra* note 35, at 4-5. And there is powerful logic for the compelling need to attain this goal:

> "The last decade has made ever clearer the determination of the Court to insure that political opportunity and influence are allocated equally among all our citizens. Any reasonable legislative policies which breathe reality into that opportunity, and which diminish inequalities in the exercise of political influence, serve vital constitutional goals, repeatedly sanctioned by the Court.
>
> "The attainment of those goals depends primarily on eliminating the use of privately donated money in campaigns. In no other way can government be opened to participation by all segments of the population, giving talented poor people for the first time a genuine chance to compete for office. In no other way can public policy-making be insulated from skewing by private interest. In no other way can the electoral balances be immunized from the effects of differential wealth distribution in the society as a whole." [258]

An alternative such as matching grants, which moves only part way toward the elimination of dependence on private money—and which Congress expressly rejected as inappropriate for presidential general elections—cannot be regarded as a "less restrictive" solution to the compelling need.

In this case, there simply is no readily apparent less restrictive means of accomplishing the legitimate legislative ends. This is not a case in which the legislative objectives could be met by straightforward and plainly workable adjustments such as reducing the durational

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[257] United States *Amicus* Br. 100-01. Appellants are presumably constrained from suggesting such a proposal by their view (Br. 164-68) that this system is unconstitutional as well.

[258] Fleishman, *supra* note 218, at 415. *Accord*, D. Adamany & G. Agree, *supra* note 48, at 43-44. For similar reasons, a prominent economist has termed these public financing provisions "the most important law passed in 1974." A. Okun, Equality and Efficiency: The Big Tradeoff 24-25 (1975).

residency requirement [259] or shortening the period of time required to switch political affiliation.[260] The suggestion of less restrictive alternatives in this case is simply an attempt to debate again in this Court the difficult issues of legislative policy already resolved by the Congress. We agree with the United States as *Amicus* that:

> "It is, of course, for Congress to decide what to adopt as a compromise among the interests of the major and minor parties, taking into account the need for reasonable administrative feasibility and the interest in protecting the Treasury against raids by candidates without prospect of success. If more than one solution is constitutionally acceptable, the choice of Congress must be respected." United States *Amicus* Br. 102.

6. *The Ten-State Eligibility Requirement Is Not Invidiously Discriminatory*

Chapter 95 gives assistance to a minor or new party candidate who has established a broad base of public support by qualifying to have his name listed on the ballot in ten or more states. 26 U.S.C. § 9002(2)(B). This eligibility requirement serves an important interest in reserving federal resources for candidates who appeal to a national rather than a local constituency and are thus serious contenders for the Presidency.

While a "favorite son" or other candidate having strictly local appeal may serve a variety of legitimate

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[259] *Compare Dunn* v. *Blumstein*, 405 U.S. 330, 348, 353 (1972); *with Burns* v. *Fortson*, 410 U.S. 686 (1973); and *Marston* v. *Lewis*, 410 U.S. 679 (1973).

[260] *Compare Kusper* v. *Pontikes*, 414 U.S. 51, 59 (1973); *with Rosario* v. *Rockefeller*, 410 U.S. 752 (1973); *see Storer* v. *Brown*, 415 U.S. 724, 761 (1974) (dissenting opinion of Brennan, J., joined by Douglas and Marshall, JJ.).

political functions, Congress may permissibly conclude [261] that those functions are not of sufficient national importance to entitle a candidate to a federal subsidy. Congress thus required that a candidate meet the qualification requirements of ten states before receiving assistance.

There has been no showing that this ten-state requirement is unreasonably high or discriminatory. Victory in the electoral college requires the votes of the 11 largest states or the 40 smallest states. Findings I, ¶ 51, IIA J.A. 26. Thus, Congress has not even required a candidate to show that he has support in a group of states that constitute a majority of the electoral college, as it might have done.[262] The ten-state figure merely requires a candidate to show that his support has *some* substantial breadth.

Absent a showing that this requirement works undue hardship on any candidate, such a matter of line drawing is reserved for legislative judgment.[263] No appellant has alleged or shown that he will even be affected by this requirement. McCarthy is the only appellant who is a presidential candidate, and it is far too early to tell whether he will qualify in ten or more states.

7. *"Independent" Candidates Are Not Denied General Election Funding*

Appellants asserted below that Chapter 95 provides assistance only to candidates of "political parties," while appellant McCarthy is an independent candidate affiliated with no party. Even if correct, that assertion would show

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[261] *See* 120 Cong. Rec. S5840 (daily ed. April 11, 1974) (remarks of Sen. Allen).

[262] *Cf. Bode* v. *National Democratic Party*, 452 F.2d 1302, 1309 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1019 (1972).

[263] *See* discussion at pp. 231-33, *infra*.

no injury to McCarthy; he has already announced that he will not accept public financing. Findings III, McCarthy ¶ 30; IIB J.A. 718; McCarthy Deposition Tr. at 89-90.

Moreover, appellants misread the statute. It is true that the general election funding provisions speak of assistance only to candidates of major, minor, or new "parties." 26 U.S.C. §§ 9003, 9004. But Subtitle H contains no definition of the term "party." "Major" and "minor" parties are defined by their success in the last election, and a "new party" is "a political party which is neither a major party nor a minor party." *Id.* § 9002 (6), (7), (8).

The FECA and FECA Amendments, companion legislation to Subtitle H, define the term "political party" to include "any association, committee, or organization which nominates a candidate for election to any federal office whose name appears on the election ballot as the candidate of such association, committee or organization." 2 U.S.C. § 431(m); 18 U.S.C. § 591(i). Relying on that definition, the court of appeals held that there is "ample room for the Commission or the officials in charge of disbursing funds to find that even informal committees formed to support independent candidates for President constitute political parties for the purposes of Chapter 95." Ct. App. Op. 1570.[264] McCarthy's group may thus qualify as a "party" if he obtains a ballot position under state law. As the court of appeals said:

[264] McCarthy's "informal committee," the Committee for a Constitutional Presidency—McCarthy '76, is already a registered political committee under the FECA. Findings III, Monroe ¶3, IIB J.A. 719. And the Commission is specifically addressing the definition of "new party" in its pending rulemaking proceeding. 40 Fed. Reg. 23833 (June 2, 1975) (Item II-G). *Cf.* Appendix A, p. 2a, *infra.*

> "Until it is shown that a narrower definition is being applied, to the detriment of independent candidates who would otherwise qualify, we are in no position to invalidate the public financing provisions of the statute." Ct. App. Op. 1570.

8. *The Provisions for Financing Conventions Are Not Invidiously Discriminatory*

Chapter 95 authorizes federal payments for major and minor party nominating conventions.[265] Appellant McCarthy argues that such payments invidiously discriminate against him because he obtained the nomination of the Committee for a Constitutional Presidency—McCarthy '76 without a convention and cannot take advantage of the convention assistance. Appellant Libertarian Party asserts a right to convention funding notwithstanding its diminutive size. *See* Findings III, Crane ¶¶ 2-11, IIB J.A. 750-52. The arguments have no substance. They ignore the inherent differences among various types of political movements and the fact that "the grossest discrimination can lie in treating things that are different as though they were exactly alike." [266]

A political movement formed around one person, as McCarthy's apparently is, plays a different role from either a major party or a minor party that has shown

[265] Congress found that:

> "Although many of the campaign finance abuses have occurred in connection with presidential general elections, the influence or potential influence of big money is as great in all phases of presidential elections.
>
> "For example, major political parties have come to rely heavily on large corporations and labor unions to pay for advertisements in convention programs to meet the expenses of nominating conventions." H.R. Rep. No. 1239, *supra* note 56, at 14.

[266] *Jenness* v. *Fortson*, 403 U.S. 431, 442 (1971).

substantial support and fields candidates for a number of different offices. The same is true of the Libertarian Party, which has held one convention in the past, at an expense of $1,423.91. Findings III, Crane ¶ 11, IIB J.A. 752. As shown above, the Court has repeatedly held that election laws may make reasonable distinctions based on these differences in political life.

For example, the Texas law upheld in *American Party* v. *White*, 415 U.S. 767 (1974), required parties of a certain size to hold primary elections, all parties to hold conventions, and independent candidates to file nominating petitions. In upholding that law, the Court held that a state does not violate the First Amendment or deny equal protection by enacting regulations that recognize the inherent differences among types of political movements. Chapter 95 is less restrictive than that law. Parties remain free to choose their methods of nominating candidates, and candidates remain free to enter primaries, compete at conventions, or form their own political organizations. There is nothing discriminatory in recognizing the public functions traditionally served by conventions and primaries and providing assistance for them without similarly compensating independent candidates who choose to eschew these traditional avenues to election, or parties that have failed to demonstrate substantial public support.

Indeed, *American Party* puts to rest appellants' discrimination arguments with respect to convention funding under Chapter 95 and primary funding under Chapter 96, discussed below. Besides regulating party organization, the Texas law upheld there provided state financing for the conduct of primary elections, which only parties above a certain size were permitted or required

to hold. No financing was provided for conventions, which all parties were required to hold and at which smaller parties nominated their candidates. 415 U.S. at 793. The Court rejected the argument that financing only primaries discriminated against the smaller parties. It said:

> "[W]e cannot agree that the State, simply because it defrays the expenses of party primary elections, must also finance the efforts of every nascent political group seeking to organize itself and unsuccessfully attempting to win a place on the general election ballot." 415 U.S. at 794.

Appellants seek—as they must—to distinguish *American Party*. They assert (Br. 165) that the Texas statute was different because it financed election costs rather than campaigning costs, and because Texas simply took a "different route to funding election-day expenses than other states. . . ." But the public financing of primaries in *American Party* was of undoubted assistance in generating publicity, strengthening party loyalty and support, and otherwise laying the groundwork for a successful general election campaign. And it permitted the benefited parties to husband their funds, while the "minority parties . . . . must undergo expenses . . . in holding their conventions and accumulating the necessary signatures to qualify for the ballot. . . ." 415 U.S. at 793-94. Nevertheless, this Court was "not persuaded that the State's refusal to reimburse for these expenses is any discrimination at all against the smaller parties and if it is, that it is also a denial of the equal protection of the laws within the meaning of the Fourteenth Amendment." *Id.* at 794.

F. The Primary Matching Provisions of Chapter 96 Are Likewise Constitutional

Chapter 96 provides federal assistance to candidates in presidential primaries. The problem of determining which candidates should receive federal assistance is different in the case of primaries than it is in general elections. Each candidate in a general election has sought and obtained the nomination of his party or has formed his own organization outside the existing parties. Therefore, the tests used to determine who will receive assistance and how much he will receive can be cast in terms of the electoral support enjoyed by the parties—either in the preceding election or (where that is not possible) in the current election. However, the range of primary candidates is virtually unlimited, and any test of the seriousness of a candidacy must be applied to the candidate himself rather than his party. *See* S. Rep. No. 689, *supra* note 35, at 5-6.

The mechanism Congress devised to allocate primary assistance to candidates who have sufficient popular support is federal matching of small private contributions. A candidate who satisfies the initial eligibility requirements, discussed below, is entitled to federal assistance based on the amount he is able to raise privately in contributions of $250 or less. This mechanism allows individual citizens to indicate by their contributions which candidates are most worthy of federal assistance.

1. *Chapter 96 Does Not Enhance but Greatly Reduces the Disproportionate Power of the Wealthy To Influence Primary Elections*

Since the Government will match only the first $250 of any contribution, the matching mechanism does not permit the wealthy to have disproportionate influence

in choosing the recipients of federal assistance. Appellants assert that federal matching of contributions up to $250 "gives wealthy people a considerable advantage." Appellants' Br. 167. But Subtitle H replaces a system of wholly private presidential campaign financing in which contributions of $250,000 or more were not uncommon. In 1972, 194 individuals contributed $50,000 or more each to presidential candidates, for a total of $27 million.[267] As we have shown, Congress did not deny equal protection by remedying the major part of the problem.

2. *Matching Is a Permissible Mechanism To Allocate Federal Assistance*

The Constitution permits Congress to employ a matching mechanism. The same compelling interests that justify using a reasonable, objective formula to determine how much assistance candidates will receive in the general election apply equally in the case of primaries. The cases discussed above confirm that Congress, which may deny assistance altogether to candidates who do not evidence "a significant modicum of support," [268] may also provide differential assistance to candidates based on an objective measure of their support among the electorate. The amount raised by a candidate in small contributions provides such an objective measure. Since only small contributions are matched, the amount thus raised evidences the degree of seriousness of support that Congress is entitled to demand.

Matching grants, of course, are a common means of allocating assistance in other federal subsidy pro-

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[267] H. Alexander, *supra* note 63, at 648.

[268] *Jenness* v. *Fortson*, 403 U.S. 431, 442 (1971).

grams.[269] As used in such programs, the matching mechanism serves the same function it does in Chapter 96: to ensure that the project is sufficiently worthy to have attracted other support before federal assistance is provided.

In this respect, matching payments under Chapter 96 will be functionally identical to the credits and deductions for political contributions authorized by the Internal Revenue Code.[270] When an individual who has contributed to a campaign receives a credit or deduction that reduces his income tax liability, the Government in effect makes part of the contribution through its loss of tax revenue. The Internal Revenue Code gives such credits or deductions for a wide range of purposes—even in areas where the Government could not subsidize directly, such as contributions to religious organizations.[271] Such tax incentives are of unquestionable constitutionality.[272] A matching mechanism, like a tax incentive, has the advantage

> "that it permits the realities of the campaign—the relative importance of the major versus the minor candidates—to be reflected through the separate decisions of millions of taxpayers, thus relieving the government of the necessity and the onus of making those decisions itself." [273]

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[269] *E.g.*, 23 U.S.C. § 120 (1970) (Highway Trust Fund); 49 U.S.C. §§ 1701-03, 1711-27 (1970) (Airport and Airway Development Act); 42 U.S.C. § 1857(c) (1970) (Clean Air Act).

[270] 26 U.S.C. §§ 41, 218, discussed at p. 187, *supra; see* Rosenthal, *supra* note 218, at 420.

[271] *See* 26 U.S.C. § 170 (1970); *Cf. Walz* v. *Tax Comm'n*, 397 U.S. 664 (1970) (upholding exemption of church real estate from property taxes).

[272] *See* authorities cited in note 218, *supra*.

[273] Rosenthal, *supra* note 218, at 418.

Matching has the additional advantage of being more progressive than tax incentives, because small private donations are matched dollar for dollar regardless of the donor's income, while the benefits of a tax incentive depend on the donor's tax bracket.

3. *The Eligibility Requirements Serve a Compelling Interest in Limiting Assistance to Serious National Candidates*

Chapter 96 gives assistance to a primary candidate who has established a broad base of public support by raising $5,000 in contributions (counting only the first $250 of contributions from any person) in each of 20 states. 26 U.S.C. § 9033. This eligibility requirement serves two functions.

First, it requires a candidate, before receiving any federal assistance, to establish that he has a substantial level of public support—at least 400 individuals willing to donate $100,000 in contributions of $250 or less. The right of Congress to impose such a requirement in order to avoid stimulating an artificial proliferation of candidates and to prevent waste of federal revenues is established by *Jenness*, *American Party*, and *Storer*, discussed above.

Second, like the ten-state requirement for general election assistance under Chapter 95, it limits federal financing to candidates who have shown popular support in a number of states. It serves an important interest in reserving federal resources for candidates who appeal to a national constituency and are thus serious contenders for the Presidency. Absent a showing that an unreasonable burden is imposed on any candidate, Congress may require that candidates show support in 20 states—

equivalent to a minimum of 89 electoral votes—before receiving assistance in presidential primaries.

Moore v. *Ogilvie*, 394 U.S. 814 (1969), relied on by appellants, held only that an Illinois statute requiring independent candidates to obtain 200 petition signatures in each of 50 counties was invalid where 52 percent of the state's voters lived in a single county and 93 percent of them lived in the 49 most populous counties. *Id.* at 816. The law had the effect of preventing the 93 percent of the voters who lived in those 49 counties from forming a new political party and placing its candidates on the ballot, thereby improperly diluting their political power.

Moore does not apply to the requirement in Chapter 96 that candidates for a presidential nomination establish support in 20 states. For one thing, the extreme discrepancies in population among counties in Illinois are not matched by the variations among the populations of the 50 states.[274] More important, the candidates in *Moore* were seeking statewide offices that they could win by obtaining a majority of the statewide vote. By contrast, the President is not elected by nationwide popular vote but is chosen by the electoral college, where the states award their electors on a winner-take-all basis.[275] Therefore, "[c]ampaign strategy must be aimed at carrying states, not simply at increasing popular vote totals." Ct. App. Op. 1567. Since no candidate can win the Presidency without attaining a majority of the electoral college, Congress is entitled to reserve federal assistance

[274] California, the largest state, has only 9.8 percent of the nation's population, U.S. Census Bureau, 1970 Census of Population, Number of Inhabitants, Table 8, at I-48, while the largest single county in Illinois has more than 50 percent of the Illinois voters.

[275] U.S. Const. art. II, § 1, amends. XII, XXIII; *see Developments in the Law—Elections*, 88 Harv. L. Rev. 1111, 1196-97 (1975).

for candidates who show support in a number of states. *See Bode* v. *National Democratic Party*, 452 F.2d 1302, 1308-09 (D.C. Cir.), *cert. denied*, 404 U.S. 1019 (1972).

Moreover, Chapter 96 is not, like the Illinois statute in *Moore*, a restriction on access to the ballot. Rather, as noted above, it is an amelioratory law designed to ensure that all nominees of serious national political movements will have the resources to run effective campaigns. Congress has not forbidden narrowly based presidential candidates to run; it has simply determined that such candidates do not serve a sufficient national function to merit federal financial assistance. Congress has substantial latitude in setting "limitation[s] on a reform measure aimed at eliminating an existing [financial] barrier to [effective candidacies]." [276]

The 20-state requirement has invigorated the early stages of presidential campaigns. Instead of quietly visiting a few financial "angels," prospective candidates for 1976 are touring the country seeking small contributions from large numbers of voters. And the money is coming in. At least eight presidential candidates have already reported qualifying for matching funds. *See* p. 123, *supra*. To date, the requirement has proven to be beneficial, not invidious as appellants contend.[277]

[276] *Katzenbach* v. *Morgan*, 384 U.S. 641, 657 (1966); *see San Antonio School Dist.* v. *Rodriguez*, 411 U.S. 1, 39 (1973); Fleishman, *supra* note 218, at 387.

[277] If the Court should nevertheless conclude that the 20-state requirement is invalid, it should merely strike that requirement, making matching funds available to candidates who have raised $100,000 in contributions of $250 or less. *See* note 249, *supra*.

4. *Financing of Primaries Does Not Discriminate Impermissibly Against Candidates Seeking Nomination by Another Route*

Appellants argue that federal financing of primary campaigns discriminates invidiously against candidates, like appellant McCarthy, who seek election by a route other than the primary. Like their attack on convention financing, this argument asks the Court to rule that Congress must be blind to the differences among routes to general election victory. Appellants' argument is based on the absence of federal financing to assist in defraying the "extensive expenditures of funds" required in seeking "ballot status in the various states." Appellants' Br. 164. Precisely this contention was rejected in *American Party* v. *White*, 415 U.S. at 792 n. 24. Indeed, Chapter 96 goes farther than the Texas law upheld there, for it assists candidates who seek nomination at a "nominating convention or caucus" as well as in a primary election. 26 U.S.C. § 9032(7).

Congress did not invent primaries or conventions as a means of conferring unfair advantages on those who participate in them. Both primaries and conventions are traditional means by which American political parties have long chosen their nominees. Federal law neither requires nor prohibits any primary election or convention. By assisting candidates who choose to run in primaries, Chapter 96 merely recognizes the public function served by primary elections [278] and attempts to ease the burden of participating in them.

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[278] *See United States* v. *Classic*, 313 U.S. 299 (1941); *Smith* v. *Allwright*, 321 U.S. 649 (1944); *Terry* v. *Adams*, 345 U.S. 461 (1953).

CONCLUSION

For these reasons, the decisions of the court of appeals and the district court should be affirmed.

Respectfully submitted,

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APPENDIX A

The Courts Below Properly Refused to Rely Upon The Statistical Evidence Offered By Appellants

The district court has made a series of findings based on statistical studies submitted by both the appellants and the nonfederal appellees (intervening defendants below). Both studies analyzed contribution and expenditure data extracted from the reports filed under the FECA of 1971. We submitted studies of the 1972 presidential election, all 1972 House and Senate elections, and all 1974 House and Senate elections, conducted by the Common Cause Campaign Finance Monitoring Project (the "Common Cause study"). Findings IIA, II J.A. 264-564.

Appellants submitted a study limited to expenditures in the 1972 Senate elections conducted by a graduate student, Roland J. Cole, for purposes of obtaining his dissertation [1] (the "Cole study"). Findings IIB, IIB J.A. 565-86.

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[1] The reception given Cole's dissertation by noted political scientists and experienced politicians cautions against reliance on its statistical methodology or its conclusions. At a series of meetings held at Harvard's Institute of Politics and John F. Kennedy School of Public Administration to discuss Cole's dissertation, the political science faculty and Institute fellows—many of whom are practicing politicians—heavily criticized the dissertation. Cole Deposition Tr. at 265-90. Although Cole refused to testify to certain aspects of these discussions (*id.* at 266-71), the following conclusions emerge from Cole's testimony.

First, "almost everyone present had at least some negative criticism of [Cole's] dissertation." *Id.* at 273. Cole's statistical methodology and vote—spending correlations received the severest criticism. There was general agreement that Cole's research "doesn't go far enough and [he] might have done some of the stuff differently . . ." (*id.* at 277), and that "more is needed before anyone will

The Cole study is based on a series of crucial mistaken assumptions. First, in determining the amount of expenditures by a candidate, Cole "includ[ed] funds which have been used to repay loans made to the candidate or his political committees. The use of the proceeds of those loans is considered a campaign expenditure and the repayment of that loan is considered a separate and additional campaign expenditure." Findings IIB, ¶ 2(d), IIB J.A. 569. The Cole assumption incorrectly *double counts* loans for purposes of determining how much was spent in the campaign, and thus inflates the spending figures relative to the spending limits.

The statutory provisions, 2 U.S.C. § 431(f) and 18 U.S.C. § 591(f), both state clearly that expenditures are limited to distributions, etc., "made for the purpose of influencing the nomination for election, or election. . . ." Even if loan repayments were thought to be for such a purpose—which they are not—surely it is impossible to regard *both* the expenditure of the loaned funds *and* repayment of the loan as within this definition. The Cole assumption—unsupported by the statute or its legislative history—would distort the practical effect of the expendi-

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have a complete answer for the relationship between money and votes . . ." (*id.* at 273-74). Cole "heartily agreed." *Id.* at 274.

A Harvard professor whose field is voting behavior concluded that Cole's discussion of the relationship between expenditures and votes "promise[d] a bit more than it actually delivered." *Id.* at 287-88. It was this part of Cole's dissertation which offered the questionable conclusion that "not only does the higher spending campaign win most of the time, its share of the votes cast is closely correlated with the share of the dollars spent." *Id.* at 289, citing Cole's dissertation at 80. The methodology underlying Cole's conclusion was criticized by John J. McGowan, an expert in statistical analysis, in an unchallenged affidavit. Affidavit of John J. McGowan, Ex. 3 to Response of Defendants and Intervening Defendants to Plaintiffs' Proposed Findings of Fact, ¶ 6. The district court found that several fundamental "reservations" attached to Cole's statement. Findings IIB, ¶ 73, IIB J.A. 585.

ture limits in a way Congress neither intended nor enacted. For example, if a candidate borrows $20,000, spends that money in the campaign, and then raises $20,000 to repay the loan, he has had $20,000 available for use in the campaign—not $40,000. Cole uses the $40,000 figure in determining campaign spending, and there is no question that it is the $20,000 figure that applies for purposes of the spending limit.

Second, Cole counted as general election expenditures amounts that would be counted as primary expenditures under the new law. Cole defined general election spending as including expenditures during the primary period where the candidate was unopposed in the primary, or where the candidate's opponent(s) received less than ten percent of the primary vote. Findings IIB, ¶ 2(a), IIB J.A. 568. However, the legislative history is very clear that an unopposed candidate in a primary can charge all his expenditures during the primary period against his primary spending limit and not count them against his general election limit.

When S. 3044, the Senate version of the FECA Amendments of 1974, was being debated in the Senate, it provided, in proposed Section 504(c), that: "[n]o candidate who is unopposed in a primary or general election may make expenditures in connection with his primary or general election campaign in excess of 10 percent of the limitation" on expenditures. Senator Cranston introduced an amendment, No. 1125, to strike the words "primary or" from this section of the bill. He argued at length that it would be unfair for an unopposed candidate in a primary election to be denied the opportunity to make the same expenditures—and thus gain the same level of recognition looking toward the general election—as his

opponents facing a contested primary in another political party. Senator Dole agreed with Senator Cranston, as did the Chairman of the Rules Committee, Senator Cannon. The amendment was accepted without objection, 120 Cong. Rec. S5701-02 (daily ed. April 10, 1974), and no later version of the legislation contained such a restriction. *See* 18 U.S.C. § 608(c).

The FEC has confirmed this reading of the statute. FEC Advisory Opinion 1975-9, 40 Fed. Reg. 36242 (Aug. 19, 1975).[2] This means that Cole has included substantial amounts in his calculation of general election spending which will be treated as primary spending for purposes of the new law, and his general election spending figures are thus erroneously inflated.

Third, Cole attempts to segregate the amount spent during a primary from the amount spent in a general election based on the reports filed under the 1971 FECA. Findings IIB, ¶ 2(a)-(c), IIB J.A. 568-69. Such segregation cannot be performed with any accuracy under the 1971 Act, because (1) it is impossible to determine from reports under the 1971 FECA whether payments made before or after the primary date were made for services provided before the primary, and (2) the timing of the reports leaves a period immediately before and after the primary date in which it is impossible to allocate reported expenditures. Cole himself admits that the 1971 reports do not permit one to determine accurately which expenditures made between a month before and a month

[2] The Commission has received a request for an advisory opinion whether the same result obtains for an independent candidate who runs in no primary but must spend to gain access to the ballot as an independent. FEC AOR 1975-53, 40 Fed. Reg. 40678-79 (Sept. 3, 1975). We believe such a candidate may spend up to the primary ceiling during the period before the party primaries. *See* pp. 223-25, *supra*.

after a primary were made for the general election, and that candidates tended to report an expenditure on the basis of the date when it was made without regard to whether it was related to the primary or general election. Cole Deposition Tr. at 50-55, 63-67. Appellants concede as much. Appellants' Br. at A2.

The Common Cause study on which we rely avoids Cole's mistaken assumptions in the following ways. First, where loans are received by the candidate or his political committees, the use of the proceeds of these loans is considered a campaign expenditure, but the repayment of that loan is not considered a separate and additional campaign expenditure. Findings IIA, ¶ 2(a), IIA J.A. 267. This avoids the inflated double-counting contained in the Cole study.

Second, the Common Cause study follows the legislative history and the Commission ruling establishing that a candidate is free to spend the full expenditure limit for the primary period, regardless of whether he faces primary opposition.

Third, the Common Cause study does not attempt to segregate primary expenditures from general election expenditures, since this cannot be done with any accuracy from the reports filed under the 1971 FECA. Findings IIA, ¶ 2(b), IIA J.A. 267. Instead, it compares total campaign expenditures for each candidate to the combined primary and general election expenditure limits under the new laws. This is the only meaningful and accurate comparison that can be made from the reports filed in 1972 and 1974 under the FECA.

Appellants argue that the combined overall limit is a misleading measure because some candidates had only one serious contest. Appellants' Br. at A2-4. The fact that some candidates had only one serious contest does

not make it reasonable to conclude, as appellants have, that in such races the total amount spent during both election periods must be compared with the spending limit *for just one period.* The example appellants cite in fact belies their reasoning: In 1972, as appellants note, challenger Holtzman spent about $104,000 defeating a House incumbent in the primary and a major party opponent in the general election. Appellants speculate that, since the primary was a closer race than the general election, Holtzman may have made almost all of her expenditures in the primary—thus exceeding the $84,000 primary limit. On the contrary, Holtzman's reports reveal that her campaign made expenditures of over $43,000 after September 1, 1972—ten weeks after the primary. If even half of that $43,000 was spent to influence the general election, then her primary spending was below the $84,000 limit, and the Common Cause figures mislead no one.

Furthermore, as we have explained, the new law permits a candidate with no primary opposition to spend up to the primary ceiling during the primary period without counting it toward his general election ceiling. Even if some candidates in past election years have bunched their spending in the general election period, they will be free to adjust their spending to take advantage of the combined ceilings. Thus the overall limits are not misleading measures of the effect the FECA Amendments will have on candidate expenditures, but are rather the best available measure to predict their effects.

Appellants at one point questioned the treatment of loans in connection with the Common Cause study.[3] Ac-

[3] The questions did not involve the double-counting defect of the Cole study referred to above.

cordingly, certain important sections of this study, Findings IIA, ¶¶ 52-61, 91-92, IIB J.A. 451-54,461-62 were recomputed using the loan assumptions suggested by appellants; the additional computations show no material changes in relative impact. *See* Findings IIA, ¶ 115, IIB J.A. 473-74. Appellants' criticism (Br. A4) has thus been mooted.

Appellants attack the Common Cause expenditure figures as misleading on one other ground—that the figures are low as a guide to future spending because the reporting and disclosure requirements in these laws will increase the cost of fund-raising. *Id.* They give the example of Senator Tower's expenditure of $30,000 for computer processing of contributions and expenditures. However, appellants fail to state that Senator Tower spent $2.3 million in his 1972 campaign and that the $30,000 fund-raising cost is a mere 1.3 percent of that huge amount. Findings IIB, ¶¶ 3, 16, IIB J.A. 570, 576.

Thus, the Common Cause studies are based on accurate assumptions that make them the best available for purposes of this case. Moreover, in both 1972 and 1974, congressional candidates were given the opportunity to review and correct the campaign finance totals set forth for them by the Common Cause Monitoring Project (including their total contributions and total expenditures). The Monitoring Project has made public an enormous amount of campaign finance data during the past three years, dealing with thousands of candidates and hundreds of registered interest groups; it has rarely received any requests for correction of such campaign finance data following publication. Findings IIA, ¶ 1, IIA J.A. 264-66.

The Common Cause study, which is the basis of all findings in Part IIA of the district court's order (cited

as "Findings IIA"), therefore represents the most complete and best available collection of data. The court of appeals was correct in relying exclusively on the findings based on that study. Ct. App. Op. 1540 n.105.